India. Laws, statutes, etc. Civil
= procedure law.

THE

SPECIFIC RELIEF ACT,

NO. I OF 1877

WITH

COMMENTARIES THEREON

AND

AN APPENDIX OF FORMS

BY

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FORMERLY

VICE-PRESIDENT OF THE COMMITTEE OF COUNCIL ON EDUCATION,

AND NOW

SECRETARY OF STATE IN ENGLAND FOR INDIA

PREFACE.

NEXT to the XII Tables the Prætorian Edict ranks as the most important source of Roman law. In form each item in the Edict was a declaration of the Prætor that under given circumstances he would grant an action or a special defence. The perpetual edict was thus a collection of actions supplementing and amending the Twelve Tables. The Chancellor of the King acted in England somewhat in the way in which the Prætor had acted at Rome (1) creating and enforcing supplementary or improved remedies where the common law gave none or only inadequate ones.

The Specific Relief Act collects many of the cases where the ordinary remedy by damages could not be obtained or if obtainable was inadequate and incompetent to offer that entire justice which demanded an actual specific performance of the legal obligation sometimes with sometimes without damages according as circumstances should require.

The Act though a most useful legislative measure is not a complete code of all the cases in which the Chancellor played so important a part as a legal reformer. But most of the omitted cases have been provided for in other Acts of the Legislature. The Indian Trusts Act deals with the administration of trust property.(2) The Civil Procedure

(1) Griffith's Institutes of Equity, 8—11.
(2) See Griffith's Commentaries on the Indian Trusts Act.

Code regulates the taking of the accounts of a deceased person.(1)

The Transfer of Property Act carries into effect all the subsidiary rights involved in the redemption and foreclosure of the right to redeem in the reconveyance or sale of mortgaged property.(2) And the Contract Act together with the Civil Procedure Code determine when a partnership may be dissolved and how the complicated rights of the partners amongst themselves and of the creditors of the firm may be adjusted.(3) And lastly that most comprehensive legislative measure, the Insolvency Act furnishes a method of realizing the assets of insolvent individuals partners and firms.(4)

In annotating any act of the Legislature which defines the remedy but not the right it is the duty of the commentator to explain with sufficient fulness the rights which were in the contemplation of the legislator. Such rights being very numerous the province of the author has been very extensive. He has however endeavoured to occupy it thoroughly and to give to both the student and the practitioner all adequate information.

Lord Macaulay and his successors have acted wisely in appending illustrations to the dry statement of legal principles contained in their codes. The simply stated principle dignifies the illustration and raises the ordinary pursuits of life whence the illustrations are drawn to the level of arts and sciences. On the other hand the illustration

(1) See Griffith's Commentaries on the Code, pp. 320—321, 330.
(2) See Griffith's Commentaries, sec. 60—67, 80—95.
(3) See the Contract Act, s. 254 & Griffith's Civil Procedure Code, p. 326.
(4) Griffith's Commentaries on the Insolvency Act, 11 & 12 Vict. c. 21 and Griffith's Civil Procedure Code, 131—137.

illuminates as well as gives precision to the principles, takes away from the dryness of the subject and embellishes it with a kind of poetic painting. While too the codifiers have arranged the principles in order and thereby facilitated the comprehension of their logical force the illustration is calculated to make a deeper impression on the memory and to habituate the mind to the practice of the rules of justice. And now to the students of Equity and to the practitioners in the High Courts and in the Mofussil we commend our treatise, trusting that they will find it very useful.

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November 1895.

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PART III.

OF PREVENTIVE RELIEF.

APPENDIX.

TABLE OF CASES CITED.

ERRATA AND ADDENDA.

Page 2, seventh line of sec. 3, *for* "lægis," *read* "legis."
„ 7, line 21, after "validate," *insert* "an."
„ 26, thirteenth line of sec. 10, *for* "fare," *read* "face."
„ 34, lines 2 and 5, from the bottom, *for* "Pegnus," *read* "Pignus."
„ 35, line 15 from the bottom, *for* "Selia," *read* "Silia."
„ 35, „ 10 „ *for* "æbritia," *read* "æbutia."
„ 35, „ 8 „ *for* "querelian," *read* "queritian."
„ 36, „ 11 „ *for* "recuporandam," *read* "recuperandam."
„ 40, „ 15 „ *for* "create," *read* "created"
„ 49, „ 10 „ *for* "that," *read* "there."
„ 67, „ 5, *after* "410," *insert* "(1)" and *read* at bottom as footnote: "(1) The rule was placed on a more equitable basis in Maxim 1893, 1 Ch. 630."
„ 68, „ 26, *for* "50," *read* "40."
„ 71, „ 22, *after* "441," *add* "As to compromise of a trespass, see Bayley, L. R. 647."
„ 72, „ 24, *for* "fined," *read* "fixed."
„ 73, „ 4, *for* "without," *read* "with."
„ 77, „ 23, *for* "only," *read* "on."
„ 80, „ 4, *after* 441, *add* "Oxford Corporation 1893, 3 Ch. 935."
„ 84, „ 16, *after* "suit," *add* "see p. 75."
„ 87, „ 9 from the bottom, *for* "by," *read* "See."
„ 88, „ 18, *for* "sufficiently," *read* "sufficient."
„ 88, „ 32, *after* 31, *add* "Turner 1895, 2 Ch. 205."
„ 93, „ 3, *for* "out," *read* "ought."
„ 95, „ 3, *for* "stork," *read* "stock."
„ 101, „ 19, *for* "then," *read* "they."
„ 110, „ 6, *for* "xl," *read* "xi."
„ 115, „ 5, *after* "66," *add* "Whitely 1891, 1 Ch. 558."
„ 115, „ 15, *after* "248," *add* "See Griffith's Code of Civil Procedure."
„ 118, „ 18, *for* "to the full," *read* "befal."
„ 120, „ 26, *after* "agreement," *insert* "(1)" and *read* at bottom as footnote: "(1) As to rectification of a Trade mark Register, see Powell, 1894, A. C. 8."

Page 122, *after* line 3, *add* as new para. "A judgment may declare trusts without rectification. Annesley, 31 L. R., Ir. 457."

„ 127, line 7, *for* "transferee," *read* "transferor."

„ 127, „ 13, *for* "the," *read* "in a" and *for* "purchasers," *read* "purchase."

„ 127, „ 16, *after* "22," *add* "On default after judgment for a lien plaintiff may rescind. Baker 3 R. 305."

„ 136, „ 22, *for* "try," *read* "by."

„ 138, last line at bottom, *for* "other than a human being," *read* "physical or metaphysical."

„ 139, line 15, *for* "alive," *read* "child."

„ 139, „ 27, *after* "Wards," *add* "and Griffith's International Law, 38—40."

„ 141, „ 16, after "*esse*," *add* "Cp. s."

„ 146, „ 1, *after* "of the public," delete 7 lines and *read* "who formally, &c."

„ 146, *after* line 13, *read* as new para. "Where a kanom of tarwad property is granted by the karnavan to members of the tarwad and the property in question remains in the possession of the karnavan on behalf of the tarwad a junior member may prevent the possession becoming adverse to the tarwad by obtaining a decree declaring the kanom invalid. But if the kanom is granted to a stranger to the family who is in possession, possession must then be sought for as relief consequent on the declaration. Padammah, 17 M. S. 232."

„ 147, line 6, *for* "from," *read* "for."

„ 147, „ 28, after "195," *add* "Money advanced may entitle to a declaration of charge. Durham, 2 Meg. 760."

„ 151, „ 8, *after* "case," *add* "Cp. s. 42."

„ 153, „ 3, for "*mataux*," read "*metaux*."

„ 155, „ 10, *after* "302," *insert* "(1)" and *read* at bottom as footnote: "(1) Should a receiver misapply money his sureties as well as he becomes liable. Graham 1895, 1 Ch. 66."

„ 155, „ 28, *for* "execution," *read* "executor"

„ 159, last line "N. 51," *add* "See Griffith's Companies Act, Marwick 1895, 1 Ch. 776. Court seldom refuses liberty to try a feasible claim against the receiver. Lane 1891, 3 Ch. 411. A receiver ought to lend documents to official assignee. Engel 1892, 1 Ch. 442. See Griffith's Insolvency Act. A receiver

in a debenture holder's action may be authorized by court for purposes of company to raise money with a prior charge. Greenwood 1894, 2 Ch 205; Strapp. 1895, 2 Ch. 1."

Page 160, line 5, *after* "them," *insert* "(1)" and *read* at bottom as footnote: "(1) In many cases an injunction supplies the remedy otherwise given by mandamus."

" 163, " 9, *after* "mandamus," *add* "R. *v.* C.C. Judge, 65 L. J. 320.

" 173, " 3 from the bottom, *after* "231," *add* "To improve the land is not waste. Meux 1892, 2 Ch. 247."

" 175, " 3, *for* "only," *read* "also."

" 175, " 10 from the bottom. *after* "§ 861," *add* "Griffith's Fraud, Misrepresentation and Mistake, Ch. VII"

" 177, " 1. *for* "result which might result," *read* "possible inconvenience."

" 179, " 6, *after* 436, *add* "Daniel 1891, 2 Ch. 27; Martin 1894, 1 Ch. 276"

" 188, " 27, *after* "secrets," *insert* "(1)" and *read* at bottom as footnote: "(1) Before dissolution any partner may take copies of entries in books even with object of future competition, 1895, 1 Ch. 462."

" 202, " 18, *after* 77, *insert* "(1)" and *read* at bottom as footnote: "(1) Where an injunction would be oppressive and the injury is small and can be estimated in money, damages are granted. Meux 1895, 1 Ch. 287."

" 210, " 19, *after* "150," *add* "Cooper 1895, 1 Ch. 567. Printers blocks (1)" *read* at bottom as footnote: "(1) Infringement in a foreign country cannot be restrained. Morocco 1895, 1 Ch. 434."

" 231, Appendix, line 22, *for* "Forms of Decrees," *read* "List of Forms of Decrees."

" 233, " after line 14, *insert* as heading "Forms of Decrees."

THE

SPECIFIC RELIEF ACT,

NO. I OF 1877.

(*Received the assent of the Governor-General on the 7th February* 1877.)

AN ACT *to define and amend the Law relating to certain kinds of Specific Relief.*

WHEREAS it is expedient to define and amend the Law relating to certain kinds of specific relief obtainable in civil suits; It is hereby enacted as follows:—

Preamble.

PART I.

PRELIMINARY.

Short title.

1. This Act may be called "The Specific Relief Act, 1877:"

Local extent.

It extends to the whole of British India, except the Scheduled Districts as defined in Act No. XIV of 1874;

To Act XIV of 1874 must be added Act XX of 1886, s. 8 and Schedule II. In Upper Burmah excepting the Shan States

section 9 alone is in force; in the town of Mandalay all the sections.

Commencement.

And it shall come into force on the first day of May 1877.

Repeal of enactments.

2. On and from that day the Acts specified in the schedule hereto annexed shall be repealed to the extent mentioned in its third column.

A declaratory decree cannot be obtained where it is open to the plaintiff to ask for an account of moneys received by him under a certificate of heirship and for payment of moneys not properly accounted for.—*Bai* v. *Mulchand*, I. L. R. 9 B. S. 355.

This section and schedule are repealed by Act XII of 1891 without restoring rights.

Interpretation-clause.

3. In this Act, unless there be something repugnant in the subject or context,—

'Obligation.'

'obligation' includes every duty enforceable by law:

Obligation duty may arise from trust, contract or tort. An obligation is defined as "vinculum lægis quo alicui astringimur."

'trust.'

'trust' includes every species of express, implied, or constructive fiduciary ownership:

"*Trust.*" Mr. Griffith's edition of the Indian Trusts Act will give the reader clearer notions of the different species of that source of rights and duties called Trusts.

Mr. Stokes suggests that the following improvements might be made in the Act. The classification of trusts should harmonize with that of Act II of 1882.

Section 10 should show that when the court compels the delivery of title deeds it may impose terms.

It should also be stated whether laches is a defence in a suit for specific performance: that a decree can be made coupled

with an award of indemnity, and also that decrees can be made where the subject-matter of the contract is land out of British India if the defendant is within the local jurisdiction. The discretion of the court in the appointment of receivers should be explained by illustrations.

The Indian Trusts Act, see Griffith's edition, Chap. IX classes constructive and resulting trusts under the head of quasi trusts or obligations in the nature of trusts. It will be seen on a cursory inspection of the section that such a definition of a constructive trust differs from that of the present section. Some resulting trusts are implied trusts; others are constructive trusts.

Voluntary trusts for the payment of creditors are usually by deeds in the first instance revocable by the debtor which, however, become irrevocable settlements on the creditors becoming parties or quasi parties thereto. A creditor by altering his position on faith of the deed obtains rights against the trustee.—*Johns* v. *James*, 8 Ch. D. 744. But as long as the trustee is only trustee for the debtor the creditor cannot intermeddle.—*Garrard* v. *Landerdale*, 3 Sim. 1 Re. D'Angibau, 15 Ch. D. 242.

In *Cave* v. *Mackenzie*, 46 L. J. Ch. 564, a case of sale of immoveable property to an agent it was held that immediately the contract was signed the estate passed to the true purchaser from the vendor. In *Heard* v. *Rilley*, L. R. 4 Ch. 548, the real purchaser was allowed at the same time to establish the agency and enforce the contract against the vendor. In *Bartlett* v. *Pichersgill*, 477*n*, though the agent was convicted of perjury it was held that after conveyance to him the statute of frauds, s. 7, requiring a trust to be in writing debarred the real purchaser of a remedy. In the case of *James* v. *Smith*, 1891, 1 Ch. 384 the court of first instance followed *Bartlett* v. *Pichersgill*. The Statute of Frauds, s. 7, has been repealed in India, but Griffith's Indian Trusts Act, s. 5, p. 30, shows that writing is still requisite in most trusts affecting immoveables. The author, however, suggests that *Cave* v. *Mackenzie* is a good authority and that the proviso as to Illustration (*a*) is an implied trust. Illustrations (*b*) to (*h*) are constructive trusts.

The proper sense of the word contingency signifies any event which is uncertain future and not belonging to the very nature

of the transaction, inasmuch as rights may be made dependent upon it by private will or consent.

Where a pardanusheen lady living apart from her relations and natural advisers makes a deed in favour of a person who has on some occasions acted as her man of business the strongest proof ought to be given by him that the transaction was a real and *bonâ fide* one and was fully understood by the lady whose property is dealt with.—*T. Tewarry* v. *N. S. A. H. Khan*, L. R. 1, I.A. 192.

'trustee.' 'trustee' includes every person holding, expressly, by implication, or constructively, a fiduciary character:

"*Fiduciary character.*" See Griffith's Trusts Act, 1882, ss. 88 and 94.

Illustrations.

(*a.*) Z bequeaths land to A, 'not doubting that he will pay thereout an annuity of Rs. 1,000 to B for his life.' A accepts the bequest. A is a trustee within the meaning of this Act for B to the extent of the annuity.

(*b.*) A is the legal, medical, or spiritual adviser of B. By availing himself of his situation as such adviser, A gains some pecuniary advantage which might otherwise have accrued to B. A is a trustee for B within the meaning of this Act of such advantage.

(*c.*) A, being B's banker, discloses for his own purpose the state of B's account. A is a trustee within the meaning of this Act for B of the benefit gained by him by means of such disclosure.

(*d.*) A, the mortgagee of certain leaseholds, renews the lease in his own name. A is a trustee within the meaning of this Act of the renewed lease for those interested in the original lease.

(*e.*) A, one of several partners, is employed to purchase goods for the firm. A, unknown to his co-partners, supplies them, at the market-price, with goods previously bought by himself when the price was lower, and thus makes a considerable profit. A is a trustee, for his co-partners, within the meaning of this Act of the profit so made.

(*f.*) A, the manager of B's indigo-factory, becomes agent for C, a vendor of indigo-seed, and receives, without B's assent, commission on the seed purchased from C for the factory. A is a trustee, within the meaning of this Act, for B, of the commission so received.

(*g.*) A buys certain land with notice that B has already contracted to buy it. A is a trustee, within the meaning of this Act, for B, of the land so bought.

(*h.*) A buys land from B, having notice that C is in occupation of the land. A omits to make any inquiry as to the nature of C's interest therein. A is a trustee, within the meaning of this Act, for C, to the extent of that interest.

Words precatory and recommendatory as in the Roman law they might so with us they may create an implied trust. *Parsons* v. *Baker*, 18 Ves. 476, Griffith's Institutes 51.—*Eaton* v. *Watts*, L. R. 4 E. C. 151. But positive gifts, possible trusts and discretionary powers require careful discrimination.

"Where there is a power to appoint part of a settled fund, the execution of the power takes the part appointed entirely out of the settlement; although, therefore, the beneficial interest in it is not in terms immediately disposed of, yet there can be no resulting trust for the benefit of any person under the deed creating the power; for where the principal of a fund is appointed it must be considered as if it had never been comprised in the trust, because it is absolutely taken out of it by the execution of the power. Therefore, where a wife, under a settlement of her personal property, which was settled on herself and her husband and the survivor, and was afterwards to be laid out in land to be settled on the heirs of her body by him, remainder to the survivor in fee, had a general power to appoint 1,500*l*, part of the money, and she did appoint it to a trustee, to pay to her nieces 1,500*l*. and 500*l*. respectively when twenty-one or at marriage; it was held, that the sum was wholly taken out of the settlement, and that there was no resulting trust, and the trustee having the whole capital money in his hands for the benefit of the cestuis que trust, the capital would draw the interest with it."—Sugden's Powers, 8th ed., p. 467.

The above doctrine is important with reference to succession and legacy duty.—*A.-G.* v. *Brackenbury*, *J.* (63), 257.

The court cannot execute a power where the donee declines to do so.—Sugden's Powers, ch. xi, s. 6, 8th ed., p. 588. But in laying down this broad rule we must be careful to distinguish between mere powers and powers in the nature of trusts. The distinction between a power and a trust is marked and obvious. "Powers," as Chief Justice Wilmot observed, "are never imperative.—*A.-G.* v. *Lady Downing*, Wilmot, 23. They leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted." But sometimes trusts and powers are blended; a man may be invested with a trust to be effected by the execution of a power given to him, which is in that case imperative; and if he refuse to execute it, or die without having executed it, Equity, on the general rule that the trust is the land, will carry the trust into execution at the expense of the remainderman, and without any regard to the person in whose favour it is to be executed being a mere volunteer, and not a purchaser, creditor, wife or child. This is the case where a power is given by a will to trustees to sell an estate and apply the money upon trusts. The power is in the nature of a trust. The legal estate, until the execution of the power, of course descends to the heir at law, and if the power be defeated at law by the death of the person to whom it was given, the legal estate would ramain in the heir at law for his own benefit; but Equity, acting upon the trust, will compel the heir to join in the sale of the estate for the purposes designated by the testator.

On the other hand, the discretion to be exercised in the execution of a power must be distinguished from the bare trust: e. g., a testator devised real estate to trustees, and gave them a power of granting leases for the term of twenty-one years. The trustees disclaimed the trust, and the heir at law, who was tenant for life of a moiety, granted a lease: Lord Chancellor Westbury held that the lease was invalid.—*Robson* v. *Flight*, J. (65), 147; *Tempest* v. *Lord Camoys*, W. N. 67, 296.

In *King* v. *Denison*, Lord Eldon pointed out the distinction between gifts by will *upon* trusts, and gifts by will *subject* to trusts.—1 P. & B. 260; *cited Clarke* v. *Hilton*, by V.-C. S., 2 E. C. 810. "If I give to A and his heirs all my real estate charged with my debts, that is a devise to him for a particular purpose,

but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose and nothing more, and the effect of those two modes admits just this difference: The former is the devise of an estate of inheritance for the purpose of giving the devisee the beneficial estate subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest."

Equity gives relief in transactions tainted by undue influence not only against the persons acting unduly but also against third persons who while innocent of actual fraud yet with notice or without consideration participate in the benefit. Thus a debtor induced his niece, lately a ward of court, to join in a guaranty. The creditors taking it with notice of the relation and that she received no consideration for it relief was given against them.—*Maitland* v. *Irving*, 15 Sim. 43. Innocent relations will have to surrender the prey.—*Bridgman* v. *Green*, 2 Ves. 627. But purchasers for valuable consideration without notice may retain the property.—*Basset* v. *Nosworthy*, 2 L. C. in Eq. 1; *Blackie* v. *Clark*, 15 Bea. 595.

Confirmation or acquiescence may validate avoidable transaction which is the origin of a constructive trust. But the confirmation is not sufficient unless the donor knows that it will validate a voidable transaction and that the transaction was itself voidable. It must not be done under the force pressure or influence of the former transaction it must be separate and distinct from it and not a mere conveyance executed in consequence of a contract or covenant connected with it.—*Morse* v. *Royal*, 12 Ves. 370. Similarly when a party defends by pleading acquiescence he must unequivocally show knowledge in the person acquiescing.—*Randall* v. *Errington*, 10 Ves. 428.

The same principle appears in the fiduciary relations of parent and child, guardian and ward, trustee and beneficiary. See Griffith's Institutes of Equity and Indian Trusts Act, p. . The burden of proving fairness in the transaction falls upon the person taking the advantage. Griffith's Indian Evidence Acts, 188—240 and L. R. 1 Ind. App. 206.

See Griffith's Institutes of Equity.—*Constructive Trusts*, and, *Bentley* v. *Craven*, 18 Bea. 75, fraud by a partner on the firm.

Notice. See Griffith's Trusts Act, s. 3 and Griffith's Transfer of Property Act, s. 3.

(*g.*) "*Contracted to buy.*" The better opinion is that the word contract here excludes the requirements of the Registration Act and so far adopts the principle of the cases decided on the English Statute of Fraud. See note to section 4 (*c.*)

Questions of notice are partly questions of law partly of fact, for the definition see Griffith's Trusts Act, 1882, s. 3.

"*Will or Codicil.*" As to the trusts thereof, see s. 12, cl. (*a*) and s. 30.

By the "Indian Contract Act, 1872," the words proposal, promise, consideration, agreement, contract, are interpreted. Coercion, undue influence, fraud, misrepresentation, mistake are defined.

(*h.*) Where a person purchases or advances money on property, having at the time actual or constructive notice that a third person already has a prior right to or over the property, such prior right carries with it in Equity priority of remedy. A disregard of notice which is actual, not resting on rumour nor the statements of strangers, but coming from the person interested, is not to be distinguished from positive fraud. Constructive notice, however, creates a constructive trust properly so called.

Whenever, in the investigation of title or otherwise, recitals in deeds or other circumstances exist which ought to have put the person on inquiry, and which would have led to the discovery of another's interest, Equity considers the person neglecting to make the inquiry bound by the other's interest.

Thus neglect to call for title deeds may give an equitable mortgagee, or other person holding the same, priority, though production of documents, without an opportunity of examining them, may not.—*Brumfit* v. *Morton*, V.-C. S., J. (57), 1198.

A condition not to call for the lessor's title fixes with notice of the same.—*Robson* v. *Flight*, L.-C. W., J. (65), 147.

Information of a partial restriction is constructive notice of the whole covenant.—*Wilson* v. *Hart*, V.-C. W., J. (65), 730.

A lis pendens creating an incumbrance is constructive notice.

Actual notice to counsel, attorneys or agents is constructive notice. Though this must be in hostile cases, not in mere options for purchase.—*Austin* v. *Tawney*, 2 Ch. Ap. 147. How far a person is bound by the moral or legal fraud of his agent is both at law and in equity an unsettled question.

A purchaser for valuable consideration without notice is not bound by notice to his vendor. The same principle holds with respect to mortgages.—*Chadwick* v. *Turner*, 1 Ch. Ap. 310.

The effect of the English and Irish Registration Acts calls for observation. *Le Neve* v. *Le Neve*, decided that where lands in a register county were settled by a deed which was not registered, and on a subsequent marriage with notice of the former settlement settled by a deed which was registered pursuant to 7 Anne, c. 20, the former settlement should prevail. Owing to this decision of Lord Hardwicke's the Registration Acts do not protect against actual notice. They still, however, have some effect and protect against constructive notice; and further, to search the register is itself constructive notice of all that such search ought to have discovered.

'Settlement.' 'Settlement' means any instrument (other than a will or codicil as defined by the Indian Succession Act) whereby the destination or devolution of successive interests in moveable or immoveable property is disposed of or is agreed to be disposed of:

Words defined in Contract Act. and all words occurring in this Act, which are defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively assigned to them by that Act.

"*Settlement.*" The Succession Act (see Griffith's edition, s. 3) thus defines "will" and "codicil." "Will means the legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death. Codicil means an instrument made in relation to a will and explaining, altering or adding to its dispositions. It is considered as forming an additional part of the will."

For a form of marriage articles see the appendix.

The Indian Contract Act, 1872, defines the words proposal, promise, promisor and promisee, consideration, agreement, reciprocal promises, void agreement contract, contingent contract, voidable contract, void contract; (2) consent, free consent, coercion, undue influence, fraud, misrepresentation. As to words in class (2) see Griffith's Transfer of Property Act.

Settlements are either voluntary or for a valuable consideration. An intended marriage however no less than money is if solemnized valuable to support an agreement for settlement of property on the parties married and their issue. Griffith's Institutes of Equity.

Destination refers to the persons indicated by the terms of the settlement: devolution to the transfer of the property by operation of law, as the law of inheritance, without act of the parties. Settlements are sometimes merely covenants, the trusts whereof are executory and require some further act of conveyancing to carry out the trusts and change them into executed trusts or they contain express trusts in the first instance. See Griffith's Institutes, p. 31. *Lord Glenorchy* v. *Bosville* cases Talbot 3 a leading authority on this subject, is as follows: A devised real estate to his sister B and C and their heirs and assigns upon trust until his granddaughter D should marry or die to receive the profits and thereout to pay her £100 a year for her maintenance; the residue to pay debts and legacies and after payment thereof in trust for the said D; and upon further trust that if she lived to marry a Protestant of the church of England and at the time of such marriage be of the age of 21 or upwards or if under that age such marriage be with the consent of B, then to convey the estate with all convenient speed after the marriage to the use of the said D for life without impeachment of waste voluntary waste in houses excepted remainder to her husband for life remainder to the issue of her body with remainders over. Lord Chancellor Talbot held that though D would have taken an estate tail had it been the case of an immediate devise yet the trust being executory was to be executed in a more careful and accurate manner and that a conveyance to D for life remainder to her husband for life with remainder to their first and every other son with remainder to the daughters would best serve the testator's intent.

But a most important distinction obtains between volunteers and persons possessing a valuable consideration. For the assistance of the court cannot be had without consideration to constitute a party cestui que trust as upon a voluntary covenant to transfer stock, &c., but if the legal conveyance is actually made constituting the relation of trustee and beneficiary as if the stock is actually transferred, &c., though without consideration the equitable interest will be enforced.—Eldon, L. C., 6 Vesey 656.—See sections 23*a*, 31*b* and 34.

P by a voluntary settlement assigned to trustees certain debts specified in the schedule thereto owing to him on the security of certain bills of sale in such schedule also specified and all interest therein respectively. And he directed the trustees to get in the debts and empowered them to do whatever was necessary for that purpose. The settlement contained no express assignment of the bills of sale nor of the chattels contained therein; but the redemption clauses in the bills were to the effect that on payment of the money due they should be void. No notice of the assignment was ever given to the debtors. P died having received from the debtors the debts in question. *Held*, that the settlement amounted to a complete assignment of the debts that the want of notice did not render the gift incomplete and that the settlor's estate was liable to account to the trustees for the amounts of the debts that he had got in.—*Kekewulu* v. *Manning*, 1 D. M. & G. 176; *Fortescue* v. *Barnett*, 3 M. & K. 36, followed *Woodford* v. *Charnley*, 28 Bea. 96; *Bozzey* v. *Flight*, L. R. 3 Ch. D. 269 distinguished.—*I. R. Patrick Bills* v. *Tathan*, C. A. 60, L. J. Ch. D. 111.

Section 25 of the Indian Contract Act orders that an agreement made without consideration shall not be void when it is expressed in writing and registered under the law for the time being in force for the registration of assurances and is made on account of natural love and affection between parties standing in a near relation to each other. It adds the illustration A for natural love and affection promises to give his son B 1,000 Rs. A puts his promise to B in writing and registers it. This is a contract.

Settlements in a will or made under directions in a will are not voluntary settlements. Though every one who claims under

a will is a volunteer in the sense that he takes by the bounty of the testator yet the will has no operation until his death and then every beneficiary claims under and not against him.

Settlements on marriage are governed by the same principles as other contracts. For instance they may be set aside as a fraud upon creditors.—*Colombine* v. *Penhall*, 1 Sm. & G. 228; *Bulwer* v. *Hunter*, L. R. 8 Eq. 46; *Kevan* v. *Crawford*, L. R. 8 Eq. 46. Where a wife a minor sought to enforce an ante-nuptial settlement as against the creditors of her husband the settlement having been made and negociated on her behalf by her father as her guardian; and the father under such circumstances had made a contract for her which was void as against third persons on the ground of public policy. *Held*, that the contract could be no more enforced by the minor against such third persons than it could be enforced by her had she been an adult and made the contract herself.—*E. Pogose* v. *Delhi and London Banking Co.*, I. L. R. 10 C. S. 951.

The Indian Divorce Act, s. 39, enables the court which pronounces a decree of dissolution of marriage or judicial separation for adultery of the wife, if it is made to appear to the court that the wife is entitled to any property, to order if it think fit such settlement as it thinks reasonable to be made of such property or any part thereof for the benefit of the husband or of the children of the marriage or of both. The court may direct that the whole or any part of the damages recovered shall be settled for the benefit of the children of the marriage or as a provision for the maintenance of the wife.

Savings.

4. Except where it is herein otherwise expressly enacted, nothing in this Act shall be deemed—

(*a*) to give any right to relief in respect of any agreement which is not a contract;

A letter which contains no absolute proposal or undertaking to purchase but merely fixes the price to be given for the house leaving the inspection of title deeds and the payment of earnest money to be settled at a meeting asked for; though the said letter be assented to by a letter in reply does not constitute a

complete contract capable of being enforced.—*Koylash* v. *Tariney*, I. L. R. 10 C. S. 588.

An agreement to perform a mere moral or religious duty is not enforceable under this Act; but in some instances may be enforced as a trust recognised by law.

"*Any right to relief*" such as dissolution of partnership or damages.

A contract is an agreement enforceable by law. Duties imposed by religion and morality are called imperfect obligations when not enforceable by law. See Paley's Moral and Political Philosophy.

(*b*) to deprive any person of any right to relief, other than specific performance, which he may have under any contract; or

And so a person entitled to specific performance may instead thereof bring the ordinary action for damages for breach of the contract.

Goods were insured against damage consequent on collision. *Held*, that collision must be the proximate cause and that damage in unshipping and reshipping for the purposes of repairing injuries to the ship caused by collision were not included.—*Cant.* v. *Hening*, C. A. 25 Q. B. D. 396.

(*c*) to affect the operation of the Indian Registration Act on documents.

Clause (*c*) saves us from the troublesome necessity of laying before our readers the numerous cases in which the English courts considered it would be fraudulent not to enforce specifically contracts respecting the sale of land which had already been in part performed but which contracts were deficient in some statutory requisite such as that of written evidence. The Indian system proceeds on the ground of public convenience, the English on that of individual Equity.

But where want of registration is not due to the fault of the plaintiff he may use the unregistered document as evidence in a suit for specific performance. Ragava 14 M. S. 57 and Griffith's Evidence Acts.

Mr. Griffith's description of the English system concisely

exhibits the points in which it approaches and in which in respect of part performance it differs from the Indian.

Specific Performance.

Where the common law remedy of damages for a breach of contract is not adequate, equity will decree a specific performance. We have already stated that the common and ordinary contracts fall within the jurisdiction of the Common Law Courts, because where expedition is required, and a similar thing or article to that contracted for, whether consols or a carriage horse, is easily procured, damages meet the equity of the case. On the other hand, a contract for a particular house or piece of land must be specifically performed. The Year Book, 8 Edw. IV. 4 b. exhibits the early origin of the remedy.—Cf. *Molyneux's Case*, temp. Charles I.

An agreement to lend a sum of money is not enforced in equity.—*Sichel* v. *Mosenthal*, J. (62), 275, M. R. Articles of partnership may be, but the court will hesitate if there exists ill will between the parties. Sale of shares in a partnership may be enforced.—*Homfray* v. *Fothergill*, 1 E. C. 567. Still more the sale of shares in a company ordered to be wound up.—*Paine* v. *Hutchinson*, 3 E. C. 257 ; L. J. 2 D. & S. 283. Though the payment of an annuity might extend over several years, yet specific performance was decreed at the suit of the grantee.

The Ship Registry Acts forbid the application of this doctrine to contract regarding the ownership of a ship, yet contracts regarding the proceeds of the sale of a ship or the produce of freight are enforced.—*Armstrong* v. *Armstrong*, 21 Beav. 78. The Merchant Shipping Amendment Act, 1862, while keeping the register clear from notice of trusts, enacts that equities may be enforced against owners and mortgages in the same manner as equities may be enforced against them in respect of any other personal property.—Sect. 3. Specific performance of a contract to construct a railway is beyond the powers of the court to control, and therefore has been refused.—*Peto* v. *The Brighton, Uckfield and Tonbridge Railway Company*, "The Times," 26th June, 1863. Turner, L.J., held, affirming the decree of the Master of the Rolls, that a covenant for the use of a railway and harbour might be enforced ; Bruce, L.J., dissented.—*Wilson* v. *West Hartlepool Railway and Harbour Company*, J. (65), 124. But

specific performance of an award to execute a lease of a right to use a railway has been refused.—*Blackett* v. *Bates*, 1 Ch. Ap. 117. Argumentum ab inconvenienti plurimum valet.

An agreement to let a house for three years at a yearly rent, bound the landlord to grant the tenant a lease for a term, from the expiration of the three years' occupancy, at the same rent, the tenant to keep the house in repair. Romilly, M.R. decreed specific performance four years after the expiration of the three years.—*Moss* v. *Barton*, 1 E. C. 474; 21 & 22 Vict. c. 27 enables the Equity Courts to give damages where there is a right to specific performance. But the damages are given as an incident to and not in substitution of the usual remedy.—*Lewers* v. *Earl of Shaftesbury*, 2 E. C. 270.

It is sometimes said that there must be mutuality in the contract. By this is meant mutuality of remedy, not of consideration, for absence of the latter would, as at law, vitiate the contract itself. And the rule refers to cases where something is to be done, that is, where one promise is made in consideration of another. As equity cannot well enforce the substantial performance, it usually leaves the parties to their common law remedies.—The cases on Railways, p. 111. To this rule there seems to be an exception when a party, who is freed from liability by the Statute of Frauds, prays for specific performance of a contract touching land. But a person seeking equity being bound to do equity in this case a mutuality arises when plaintiff files his bill.

Contract for the Sale of Land.

This contract is so frequently to be met with in counsel's chambers, and so often calls for adjudication by an equity judge, that in justice to our readers we shall consider it somewhat in detail. Sometimes these contracts are in the form of particulars of the property and conditions of sale, signed in accordance with the Statute of Frauds by the parties or their agent the auctioneer. At other times in the form of articles of agreement, also signed in like accordance. The terms relate to the price, deposit, title, evidence, abstract, time of payment, and conveying, interest, and remedy for misdescription, &c. Each of these heads might form the subject of a chapter, as is the case in the

able works on Vendors and Purchasers by Lord St. Leonards and Mr. Dart. Our method, however, does not permit us to enter upon the common law doctrines further than they are connected with equity, and of the equity doctrines many are noticed in other parts of this work.

In both departments of the law a rescission of the contract by either party is allowed when the other is unable or unwilling to perform his agreement; except that in equity—(1) Time is not of the essence of the contract; (2) If there be but a small defect in the quantity or quality of the estate or title, specific performance with compensation will be decreed.

If such misrepresentation or fraud is practised as to ground on action for deceit, the conveyance, even though executed, may in equity be set aside. Inadequacy of price, unless so gross as to be conclusive evidence of fraud, or unless accompanied with circumstances of imposition and oppression, is no bar to the discretion of the court in granting specific performance. Acquiescence bars a remedy and confirmation releases a right. If the parties have been at arms-length a subsequent discovery of another objection is no ground for fresh resistance. —*Russian Vyksounsky Iron Works Company*, 3 E. C. 790. Where the contract itself is founded on fraud or oppression, acquiescence, whilst he is under the same difficulty and embarrassment, will not of itself bar his title to relief. To give validity to a confirmation of a voidable conveyance the party confirming must not be ignorant of his right, still less can his right be concealed from him by the other party. He must further know that the transaction is impeachable; and with such knowledge and under no influence his execution of the deed must be sponte suâ. Knowing not only the fact of the defect of title, but also its consequences in law, he must be a free agent, not under the influence of the previous transaction.

If there is no valid rescission of the contract, and yet one party without a defence on the ground of fraud, surprise, mistake or otherwise objects to complete the sale or purchase, the other party, if he thinks damages at law an unsatisfactory remedy, may file a bill in equity praying that the agreement be specifically performed, that proper directions be given for a

conveyance and for further relief. The order made may run in the following form :—

"The court doth declare that the agreement in the pleadings mentioned ought to be specifically performed and carried into execution in case a good title can be made to the hereditaments comprised therein, and decree the same accordingly; and let the following inquiries be made, that is to say: (1) An inquiry whether a good title can be made to the estates comprised in [Lot in the particulars of sale, &c.] the agreement in the plaintiffs bill mentioned; (2) And, in case it shall appear that a good title can be made to the said estates, an inquiry when it was first shown that such title could be made, and that the further consideration be adjourned." The second inquiry may be important with respect to the right to rents or to interest. A clause declaring defendant bound to accept the title subject to a small defect, or with an indemnity against a mortgage, is not infrequent.—Seton on Decrees, 593.

In the above form we find the expression good title brought prominently forward. It is to be observed that in equity a title may be too doubtful, either in respect of a rule of law or a question of fact, to be enforced. In the Superior Courts of Common Law any title, though doubtful in equity, on which a plaintiff might recover in ejectment is good. For a list of titles which have been held good or doubtful in equity the reader is referred to Lord St. Leonard's Treatise on Vendors and Purchasers (13th ed., ch. 10, s. 3). To those there given the following more recent cases may be added.—In *Collier* v. *McBean*, 1 Ch. Ap. 81, the estate being given, but charged in the hands of trustees with payment of debts and legacies, after payment thereof, and conveyances to the donee, his title was too doubtful, it not being certain whether the trustees had received an absolute fee or one determinable on payment. In *Minton* v. *Kirwood*, 1 E. C. 449, Stuart, V.-C., held that it is no sufficient objection to the title of the vendor of an enfranchised copyhold, that a mortgagee to whom a surrender had been made had not been admitted before the enfranchisement, the deed of enfranchisement having conveyed to the vendor all the rights of the lord. In *Hume* v. *Pocock*, 1 E. C. 423, 662; 1 C. A. 379, the subject of sale was all the estate, right and interest in certain lands, the plaintiff to produce only

the title from the vendor. Stuart, V.-C., and the Lords Justices, held that the defendant was not at liberty to show aliunde that the plaintiff's vendor had no title. On the usual references the chief clerk certified that the plaintiff could not show a good title; but, it appearing that the defendant had since the purchase acquired the means of curing the defect, leave was given to amend or file a supplemental bill.—*Nicholl* v. *Jowell*, 3 E. C. 396, is another noteworthy case. By the will of A, made in 1838, real estate was appointed to B, a married woman. By a subsequent will of 1858, the whole of A's property, real and personal, was given to E. The will of 1858 was propounded by E, and probate was opposed by D, the heir at law of A. In the course of the trial a compromise was made. The compromise was signed by C, the husband of B, for himself and wife, and who, though not a party to that suit, was present in court, and by D's attorney for D and B, though without any express authority from B.

In a suit for the specific performance of the compromise, Wood, V.-C., held that though the married woman and her husband had taken the full benefit of the arrangement, and only at the last moment dropped the mask, yet specific performance must be refused, as the formalities required by the Act for Abolition of Fines and Recoveries to bind her estate had not been observed.

The minutes of the final decree for specific performance usually are as follows:—The vendor is supposed to be the plaintiff. The corresponding changes for a vendee plaintiff are easily made:—"Declare that the agreement in the plaintiff's bill mentioned, dated , ought to be specifically performed and carried into execution, and decree the same accordingly: (1) And let interest be computed at the rate of £ per centum per annum on the sum of the [residue of the] purchase-money for the estate comprised in the said agreement, from the day of , when the same ought to have been paid according to the terms of the said agreement: (2) And let an account be taken of the rents and profits of the said estate received by the plaintiffs or any of them, or by any other person since [Here a direction as to costs is sometimes added:] (3) And let upon the plaintiffs executing a proper conveyance of the said estate to the defendant (at the expense of the defendant accord-

ing to the said agreement), or to whom he shall appoint, such conveyance to be settled by the judge in case the parties differ, and delivering to the defendant upon oath all deeds or writings in their custody or power relating to the said estate, the defendant pay to the plaintiffs the balance which shall be certified to remain due to them in respect of such money and interest (and costs). Liberty to apply."—Seton on Decrees, 607.

Specific Performance of Agreements of land on the ground of Part Performance.

While treating of specific performance of agreements relating to lands it seems more convenient to notice at the same time certain incidental doctrines which in principle appertain to the chapter on Frauds. The Statute of Frauds, it may be remembered, required contracts such to be in writing and signed by the party to be charged. Where though such an agreement fails to satisfy the requisites of the statute, yet one of the parties has been induced or allowed by the other on faith in the agreement to alter his position, as, for instance, by taking possession, expending money in buildings, or other like acts of part performance, there equity considers it unconscientious that the statute should be insisted upon. Part performance resting on evidence, the application of the doctrine must be learnt from examples. We may premise that an inchoate agreement gives no more title to relief at equity than at law, and that the acts relied on must be referable to the agreement. —*Price* v. *Salusbury*, J. (63), 838.

Entrance into possession is an important circumstance, so is expenditure of money in repairs or improvements. Payment of the purchase-money does not entitle to specific performance. In *Millard* v. *Harvey*, J. (64), 1167, where a father-in-law had promised that his son-in-law should occupy a house during life, the Master of the Rolls held that the making of repairs did not take the case out of the statute.—In *Nunn* v. *Fabian*, J. (65), 868, Cranworth, L.C., enforced specific performance of a parol agreement to grant a lease, where the most important if not the only evidence of part performance was a signed receipt for a quarter's rent at the increased rate to be paid under the lease. In accordance with the general doctrine, some of the judges have felt themselves bound to introduce in some manors

a species of tenant right, that is, a right to a long lease after permitted expenditure in building. However, a majority of the judges in the House of Lords have otherwise settled the law.—*In Ramsden* v. *Dyson and Thornton*, H. L., 1 E. & I. 129. It was held, that if a stranger begins to build on land, supposing it to be his own, and the real owner, perceiving his mistake, leaves him to persevere in his error, a court of equity will not afterwards allow the real owner to assert his title to the land. But if a stranger builds on land, knowing it to be the property of another, equity will not afterwards prevent the real owner from claiming the land, with the benefit of all the expenditure upon it. So if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined.

The making of a will, in accordance with a parol promise of settlement before marriage will not on the ground of part performance take the case out of the statute.—*Caton* v. *Caton*, 1 C. A. 137.

Previously to a marriage the intended husband and wife agreed in writing that the husband should have the wife's property for his life, he paying her 80*l.* a year as pin money, and that she should have it after his death. They gave instructions for a settlement upon that footing. The settlement was accordingly prepared, when they agreed that they would have no settlement, the husband promising, as the wife alleged, that he would make a will giving her all her property. The marriage took place, and the husband made a will accordingly. After his death a subsequent and different will was found. Lord Cranworth *held*, "that marriage being necessary in order to bring a case within the statute, to hold that it also takes the case out of the statute would be a palpable absurdity. And further, that the nature of the alleged agreement was such as hardly to admit even on the part of the party to be charged of anything like part performance. As a will is necessarily until the last moment of life revocable, a contract to make any specified bequest, even when a will having that effect has been duly prepared and executed is in truth a contract of a negative nature, a contract not to vary what has been so executed, I do not see how

there can be part performance of such a contract." The decision has been affirmed in the House of Lords.—W. N. (67), 158.

Where a parol variation of a contract has been in part performed, a decree for specific performance may be obtained. Though there be a written contract, parol evidence is admissible in equity in all cases of fraud and mistake, and even to prove the total abandonment of a contract.

Specific relief how given.

5. Specific relief is given—

(*a*) by taking possession of certain property and delivering it to a claimant;

If a broker or auctioneer does nothing more than settle the price as between vendor and purchaser of goods and takes his commission, he is not liable for conversion if it should turn out that the vendor is not entitled to sell; the broker or auctioneer merely acting as a conduit pipe. But where an auctioneer receives goods into his custody and on selling them hands them over to the purchaser with a view to passing the property in them he is to be treated as having converted the goods and is liable to an action accordingly his case differing from that of a packing agent or carrier in that they merely purport to change the position of goods not the property in them.—*Barker* v. *Furlong*, Romer, March 23, 1891.

(*b*) by ordering a party to do the very act which he is under an obligation to do;

(*c*) by preventing a party from doing that which he is under an obligation not to do;

(*d*) by determining and declaring the rights of parties otherwise than by an award of compensation; or

(*e*) by appointing a Receiver.

Preventive relief.

6. Specific relief granted under clause (*c*) of Section 5 is called preventive relief.

Relief not granted to enforce penal law.

7. Specific relief cannot be granted for the mere purpose of enforcing a penal law.

The court may restrain by injunction the commission of criminal acts which affect rights of property which the court is bound to protect.—*Gee* v. *Pritchard*, 3 Swans. 413.

The word "mere" is of considerable force. For infringements of civil rights though offences against a Penal Law may be restrained by injunction. Thus an injunction may be obtained to prevent the publication of libels injurious to trade or property. Thorley's Cattle Food Co., 6 Ch. D. 582, 14 Ch. D. 763; *Thomas* v. *Williams*, 14 Ch. D. 864; *Saxby* v. *Easterbrook*, 3 C. P. D. 339; *Quarlz Hill Consolidated Gold*, 20 Ch. D. 501; *Hill* v. *Hart*, Davis 21 Ch. D. 798. But in cases of slander of title it must be proved that the slanderous statements are untrue so that the further issuing of them would not be in good faith.—*Dicks* v. *Brooks*, 15 Ch. D. 22; *Halsey* v. *Brotherhood*, 15 Ch. D. 514, 9 Ch. D. 356. Further when the cases raised in the criminal and civil courts are identical, the court will not permit the same person at the same time to pursue both remedies.—*Saull* v. *Browne*, L. R. 10 Ch. 64; *Mayor of York* v. *Pilkington*, 2 Atk. 302.

See note to section 55*e*.

Slander of goods is similar in all respects to slander of persons: in some cases the slander is privileged. Persons having an interest in a subject may say what is untrue of that subject if they do so in good faith, the interest must be special and not general like that of a trader who wishes to prevent a rival selling goods in which he deals himself-special that is, in the sense of expecting a benefit from the subject-matter respecting which the slander is uttered. In this category are persons who have a charge upon the subject-matter who are patentees protecting their own title or supposed rights. Where this interest does not exist there is no protection and the law must imply malice from untruth precisely as it does in ordinary actions for slander. The three ingredients of the action are (1) falsity; (2) malice; (3) special damage. It was doubted by Lord Bramwell in the case of *Western Counties Manure Company* v. *Lawes Chemical*

Manure Company, whether malice is necessary: in our opinion it is. As Lord Justice Lindley remarked very little would persuade a Jury that a slander which was untrue was uttered dishonestly.

The case of *Hair* v. *Geddes*, decided by Mr. Justice Kekewich, 1890. February 9—14, may be taken as a fair example of the circumstances in which an injunction may be conveniently granted in a case of libel. The dispute was between rivals in trade one of whom had had recourse to the extensive circulation of defamatory pamphlets for the purpose of discrediting the other. The Judge remarked that they were libels with regard to which no jury could hesitate to find a verdict and therefore he "ought not to hesitate to exercise the jurisdiction of the court for the purpose of restraining them." The injunction therefore went and with it an order for £25 damages. The damages without the injunction would have afforded but poor protection or consolation to the successful litigant. But while in such a case and on final judgment an injunction is a legal weapon of the greatest value and efficacy an interlocutory injunction stands upon a very different footing. Mr. Justice North, J.J., 1891, Feb. 16. The evidence is usually incomplete and the damage not ascertained. See s. 55*e*.

PART II.

OF SPECIFIC RELIEF.

CHAPTER I.

OF RECOVERING POSSESSION OF PROPERTY.

(*a*.) *Possession of Immoveable Property.*

Recovery of specific immoveable property.

8. A person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure.

During the life of D owner of land which was let to tenants from year to year and week to week the property was managed

by the defendant as her agent, the defendant receiving the rents and paying them into a separate ear marked account at his own bank D having died intestate A.D. 1867, the defendant continued to receive the rents and pay them into the bank exactly as before not informing the tenants of D's death but stating to several persons that he was acting as agent and receiver for the heir whoever he might be. The defendant thus acted till 1880 when more than twelve years having elapsed from D's death he claimed the property on his own account. The assignee of D's heir having in 1881, brought an action against the defendant to recover possession of the land and for an account of the rents and profits, the House of Lords held (1) that as to the land the acts of the defendant in receiving the rents as agent for the heir could not dispossess the heir so as to put him to his action; (2) that the defendant's acts as agent though unauthorized might be ratified by the true owner and were ratified by the plaintiff bringing his action within a reasonable time after the heir was ascertained; (3) that as to the accumulated rents and profits the defendant had made himself a trustee; (4) that the action was not barred by the English statute of limitations and that the plaintiff was entitled to judgment for recovery of the possession of the land and to an account of the rents and profits since D's death.—*Lyell* v. *Kennedy*, 14 App. Cas. 437.

Suit by person dispossessed of immoveable property.

9. If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit [(1) instituted within six months form the date of the dispossession,] recover possession thereof, notwithstanding any other title that may be set up in such suit.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof

No suit under this section shall be brought against the Government.

(1) The words in brackets are repealed by Act XII of 1891.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

It is no answer to a suit for possession brought against a mortgagor by a mortgagee who has been forcibly dispossessed by the mortgagor to allege that the mortgage and possession under it were obtained by the fraud of the mortgagee. The mortgagor's proper remedy was to bring a suit to set aside the mortgage and recover possession.—*Sayaju* v. *Ramji*, I. L. R., 5 B. S. 446. A rightful owner dispossessing the person in physical possession is not a trespasser.—Bandu, 15 B. S. 238.

A right of fishery comes within the denomination of immoveable property.—*Bhundal* v. *Pandal*, I. L. R., 12 B. S. 221, and a right of ferry. Krishna, 13 M. S. 54, but not the right to fish over another's soil.—Natabar, 18 C. S. 80.

The mere discontinuance of payment of rent by tenants does not constitute a dispossession.—*J. M. Tarini* v. *Gunga*, I. L. R. 14 C. S. 649.

The mere discontinuance to pay rent does not constitute a dispossession.—*J. M. Tarini*, I. L. R. 14 C. S. 649.

A suit under a Civil Procedure Code which was limited to the fact of possession was held no bar to a suit under this section. I. L. R. 3 M. S. 104. A possessory suit lies under this section when plaintiff's possession has been partially disturbed. S. V. 250.

It is only by virtue of this section that mere previous possession will be entitled to a decree for recovery of possession.—*Wise* v. *Akhatoon*, L. R. 7 I. A. 73, questioned but followed, *P. Chowdhry* v. *B. L. Chowdhry*, I. L. R. 14 C. S. 256.

A suit for ejectment founded on mere previous possession is barred by the section. Purmeshur, 17 C. S. 250.

A right of ferry is immoveable property or an interest therein within the section.—*Krishna* v. *Akilanda*, I. L. R. 13 M. S. 54.

"*Government*" primarily the Secretary of State in Council, 21 & 22 Vict. c. 106, s. 65.

(*b.*) *Possession of Moveable Property.*

Recovery of specific moveable property.

10. A person entitled to the possession of specific moveable property may recover the same in the manner prescribed by the Code of Civil Procedure.

Where the value is peculiarly within the knowledge of the plaintiff he must prove its amount. Griffith's Evidence Acts.

But where the defendant is guilty of force or fraud and will not produce the article the value is presumed to be the highest value of an article of the kind.—*Armory* v. *Delamirie.*

The measure of value of title-deeds is that of the estate which they represent to be reduced to a nominal value on their being surrendered.—*Loosemore* v. *Radford*, 9 M. & W. 657. The value of a bill or security is its fare value or its value in the hands of the plaintiff if it had not been lost.

The defendant being a wrongdoer cannot reduce the damages by the cost of keeping the articles nor by setting up the title or interest of a third person. But where the plaintiff relies on title not on possession it may be disproved.—*Gadsden* v. *Burrow*, 9 Em. 514. A bailee is entitled to recover against a stranger the full value but against the owner only in proportion to his special interest.—Story on Bail., 352.

When severed goods are detained their value at the time without deducting the cost of severance or an increase arising from severance is the measure of damages.—*Weld* v. *Holt*, 9 M. & W., 672.

The defendant being in the wrong cannot deduct an increase in value of the goods arising from an act of his as an act altering their form.—*Reid* v. *Fairbank*, 13 C. B. 692. Nor can he deduct the value of goods which he has confused with the plaintiffs.

The plaintiff may claim the value at time of demand or at time of trial.—*Frame* v. *Gaudet*, L. R. 6 Q. B. 204. From the market value at the principal or only place of sale is to be deducted the cost of conveyance.—*Burmah* v. *M. Mahomet*, L. R. 5 Ind. App. 134.

A document of title as a policy of insurance a bond or coupon which is voluntarily given by A to B to make the best of it for B cannot be recovered by A's executors for though a transfer

by hand be an incomplete transfer of the property represented the property in the paper passed.—*Barton* v. *Gainer*, 3 H. & N. 387. Though the finder of an article can maintain detinue against a person wrongfully depriving him of it he is not himself liable to detinue after losing it.—*Armory* v. *Delamirie*, 1 Str. 505, Com. Digest Detinue D. The rule is different where a defendant is guilty of negligence as when a solicitor loses his client's deeds not by mere accident.—*Reeve* v. *Palmer*, 5 C. B. N. S. 91. A deposit with a stranger by two or more persons interested therein does not entitle one alone to bring detinue.—*Atwood* v. *Ernest*, 13 C. B. 881. A specific coin which can be identified and a bag or chest of money may be recovered in detinue. Fitzherbert Nat. Brev. 138.

Jenkin's Cent. 207. But where a debtor sends his creditor half a bank note intending afterwards to send the second half in satisfaction of his debt the property in the first half so sent remains in the sender until he remits the second half and the creditor is bound to restore it to him on demand.—*Smith* v. *Mundy*, 3 E. & E. 22.

The damages in detinue are generally nominal. But the value of the articles detained should be ascertained and the judgment will be that the plaintiff except in cases coming within section 11 recover the articles, or in the alternative the article with the damages and costs found and the costs of increase. But special damages for the detention may be claimed in the plaint and recovered.—*Phillips* v. *Jones*, 15 Q. B. 859; *Williams* v. *Archer*, 5 C. B. 318. Detinue was brought for stock certificates which were returned *pendente lite*. *Held*, that the jury might confine themselves to an assessment of damages. In this case the property was demanded, the stock was worth £3-5-0 when it was delivered it had fallen to £1 and the plaintiff was held entitled to recover the difference.—*Williams* v. *Archer*, 5 M. G. & S. 318. A carrier if he makes no inquiry as to the contents of a box may have to pay the value of any jewelry contained therein; but the carrier would not be liable on loosing a dentist's instrument to pay for the profits and earnings which might have been made if the loss had not occurred, but he is liable for the natural consequences of his delay such as deterioration in the worth of the goods. Damages may be recovered by the owner of a ship from a freighter, or consignee detaining a ship in loading or

unloading one or more days beyond the time allowed; such damages are called demurrage but they are governed by express contract independently of detinue. The defendant may protect himself by proving leave and license. But such defence is not snpported by showing a delivery by the plaintiff to the defendant in the supposed performance of a contract which never existed.—*Gregson* v. *Ruck*, 4 Q. B. 737. Where a deposit or pledge is part of an illegal or immoral agreement and both parties are equally to blame the plaintiff cannot recover.—*Taylor* v. *Chester*, L. R. 4 Q. B. 309.

Unlike what used to be the rule in the English law the defendant has no option to pay the damage and retain the goods. See Griffith's Civil Procedure Code, s. 259.

If a bailee is defending on behalf of a third person and by his authority he may avail himself of the title of such third person in an action of detinue by the bailor.—*Rogers, Sons & Co.* v. *Lambert & Co.*, C. A. 1891, 1 Q. B. 318.

The injury complained of is not the taking which is a trespass nor the misuse and appropriation of the goods which is trover or conversion. See and consider the forms of plaint for these wrongs in Griffith's Civil Procedure Code, pp.306-7The detention must be an adverse and wrongful one. The best proof that it is adverse is evidence that the plaintiff demanded the goods and that the defendant refused to deliver them.

Explanation I.—A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled.

Where the beneficiary is in occupation of chattels under a trust by leave of the trustee the trustee has an immediate right of possession sufficient to enable him to bring an action of trover. Griffith's Trusts Act, p. 58.—*Barker* v. *Furlong*, 64 L. T. N. S. 411.

Where there is in the plaintiff a right of possession coupled with a title to the goods though the title may be liable to be defeated by the claim of a third person, yet if that third person has not intervened, a wrongdoer cannot set up the right of the third person as an answer against him by the plaintiff. S. C.

Where an auctioneer receives goods into his custody and sells them and hands them over to the purchaser with a view of passing the property in them he has converted the goods. And if his customer had no title to sell, the auctioneer is liable to the true owner notwithstanding that he acted in good faith. S. C.

Explanation II.—A special or temporary right to the present possession of property is sufficient to support a suit under this section.

Illustrations.

(*a.*) A bequeaths land to B for his life, with remainder to C. A dies. B enters on the land, but C, without B's consent, obtains possession of the title-deeds. B may recover them from C.

(*b.*) A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A, without having paid or tendered the amount of the loan, sues B for possession of the jewels. The suit should be dismissed, as A is not entitled to their possession, whatever right he may have to secure their safe custody.

(*c.*) A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B.

(*d.*) A deposits books and papers for safe custody with B. B loses them and C finds them, but refuses to deliver them to B when demanded. B may recover them from C, subject to C's right, if any, under section 168 of the Indian Contract Act, 1872.

(*e.*) A, a warehouse-keeper, is charged with the delivery of certain goods to Z, which B takes out of A's possession. A may sue B for the goods.

On the death of a tenant for life the reversioner may recover the deeds from a person with whom the tenant for life has deposited them as a security for a loan.—*Easton* v. *London*, 33 L. J. Ex. 34. A mortgage purported to convey all the deeds, the mortgagor however handed them to a banker as security for a loan. *Held*, that the plaintiff might recover.—*Newton* v. *Beck*, 3 H. & N. 220. But one who has backed the deeds cannot after parting with the estate recover them.

Viner's Abr. Detinue C. 2.—*Philips* v. *Robinson*, 4 Bing. 106. A lessee even after the term has expired is entitled to retain the estate.—*Elworthy* v. *Sandford*, 2 H. & C. 330.

The like relief is applicable to other instruments as securities for money policies of insurance bonds and promissory notes. The right to the possession of title-deeds follows the right to the land and the legal tenant for life is entitled to their custody. A sold lands to B and gave him forged title-deeds. He then deposited the real deeds with C as security for a loan. *Held*, that B is entitled to recover the deeds from C.—*Leathes* v. *Leathes*, 5 Ch. D. 221. Among joint tenants or coparceners the question of custody is one of convenience and common benefit rather than of title.—*Elton* v. *Elton*, 6 Jur. N. S. 136. But a co-tenant may compel their production. Sugden, V. & P. 369. A person having a limited or ulterior interest which is not too contingent if he can clearly show that there is a danger of their loss or construction by the person possessing them may apply to the court to have them secured—*Lempster* v. *Pomfret*, 20 Bea. 405; *Jenner* v. *Morris*, L. R. 1 Ch. 603. Sugden's V. and P. 369.

This illustration is a bailment of pledge. A bailment is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. Contract Act, s. 148.—Either the bailor or bailee may sue for an injury by a third person to the property bailed and compensation will be apportioned according to their respective interests, ss. 180, 181.

A deposited debentures with B as security for payment of a bill of exchange indorsed by A and discounted by B on the agreement that B should have power to sell or otherwise dispose of the debentures if the bill should not be paid at maturity. Before maturity, B deposited the debentures with C to be kept by him as security until the repayment of a loan from C to B larger than the amount of the bill. The bill was dishonored, and while it still remained unpaid A brought detinue against C for the debentures. *Held*, that the repledge by B to C did not put an end to the contract of pledge between A and B and B's interest and right of detainer under it, and that A therefore could not maintain detinue without having paid or tendered

the amount of the Bill.—*Donald* v. *Suckling*, L. R., 1 Q. B. 585, Bigelow's L. C. 394.

The general rule is that one who has received property from another as his bailee or agent or servant, must restore or account for that property to him from whom he received it.—*Biddle* v. *Bond*, 6 B. & S. 225. To allow a depositary of goods or money who has acknowledged the title of one person to set up the title of another who makes no claim, would enable the depositary to keep for himself that which he does not pretend to have any title in himself whatsoever.—*Betteley* v. *Reid*, 4 Q. B. 511. A bailee may nevertheless though not evicted set up and rely upon the title of a third person when he defends the possession upon the right title and authority of the third person.—*Thorne* v. *Tilbury*, 3 H. & N. 534. A bailee may equally with a tenant if there has been what is equivalent to eviction by title paramount show that the title of his bailor to the goods has expired since the bailment.—*Shelbury* v. *Scolsford*, S. C. & Yelv. 22.

In an action for wrongful detention of certain copper which had been bailed by the plaintiffs to the defendants as warehousemen to hold to the plaintiffs' order the defendants sought to administer interrogatories as to whether the plaintiffs had not since the date of the bailment sold the copper to a firm of M. K. & Co., and been paid the price and whether they had not indorsed and handed to M. K. & Co., delivery orders in respect of the copper. It appeared that M. K. & Co. were claiming the copper from the defendants but it was admitted that the latter were defending the action in their own interest alone and not under the authority of M. K. & Co. *Held*, that the defendants could not as against the bailors set up the title of third parties under whose authority they did not claim to defend, and that consequently the fails to which the interrogatories were directed not affording any defence to the action the interrogatories must be disallowed.—*Rogers & Co.* v. *Lambert & Co.*, 24 Q. B. D. 573, C. A. 1891, 1 Q. B. 318.

The property of the receiver of letters is only a qualified one and the sender may restrain their publication.—*Gee* v. *Pritchard*, 2 Swan. 402.

"The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him

to preserve the goods and find out the owner, but he may retain the goods against the owner until he receives such compensation and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward and may retain the goods until he receives it."—C. A. 168.

The finder is not bound to take charge of the thing, but doing so incurs the ordinary responsibility of a bailee. Should he refuse to deliver it up, he keeps it entirely at his own risk however it may be damaged and becomes liable to pay interest or compensation for it. Excuses however are not refusals and the finder is entitled to a reasonable time in which to satisfy himself of the claimant's title. He has no rigdt to impose unreasonable conditions, or to be exorbitant to his terms. Story on Bail. 85, 621.—*Pillot* v. *Wilkinson*, 10 Jur. N. S. 991. Information leading through a long series of causes to the arrest of a thief or finding of an article entitles as a rule to the reward.—*Tarner* v. *Walker*, L. R. 2 Q. B. 301.

Absolute property, special property, possession and the right of possession may each entitle to an action. A bailor has an absolute property, a bailee special property. A finder has such possession. And a failor who is a consignee is an example of the last cause of action; so also is a person fraudulently deprived of an article. Griffith's Civil Procedure Code, Sch. 4, Form 98.

Respecting decrees in suits under the section, see Griffith's Code of Civil Procedure, ss. 208—259. The right to have a decree reheard is not taken away.

Liability of person in possession, not as owner, to deliver to person entitled to immediate possession.

11. Any person having the possession or control of a particular article of moveable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:—

(*a*) when the thing claimed is held by the defendant as the agent or trustee of the claimant;

(*b*) when compensation in money would not afford

the claimant adequate relief for the loss of the thing claimed;

(*c*) when it would be extremely difficult to ascertain the actual damage caused by its loss;

(*d*) when the possession of the thing claimed has been wrongfully transferred from the claimant.

As to the plaint and decree in a suit under the section, see Griffith's Code of Civil Procedure, s. 260 and Sch. IV, 103. According to Fry 28 n. 6, a ship is probably within the section.

While section 208 of Griffith's Civil Procedure Code prescribes the decree for cases within section 10 of this Act and section 259 its execution the same office as to execution is performed for the present section by section 260 of Griffith's Code, Sch. IV, 103, supplies the form of plaint wanted under the present section.

Purchase for valuable consideration would be a valid defence. Sugden's V. & P. 307, but Mr. Collett doubts this.

Illustrations

of Clause (*a*).—A, proceeding to Europe, leaves his furniture in charge of B as his agent during his absence. B, without A's authority, pledges the furniture to C, and C, knowing that B had no right to pledge the furniture, advertises it for sale. C may be compelled to deliver the furniture to A, for he holds it as A's trustee.

of Clause (*b*).—Z has got possession of an idol belonging to A's family, and of which A is the proper custodian. Z may be compelled to deliver the idol to A.

of Clause (*c*).—A is entitled to a picture by a dead painter and a pair of rare China vases. B has possession of them. The articles are of too special a character to bear an ascertainable market-value. B may be compelled to deliver them to A.

CHAPTER II.

OF THE SPECIFIC PERFORMANCE OF CONTRACTS.

By specific performance is usually understood that peculiar and as it is called in England that extraordinary jurisdiction which the court exercises in respect of executory contracts as

contrasted with executed contracts. An executory contract is one which is not intended between the parties to be the final instrument regulating their relations: an executed contract is one which is intended to be final.—*Selborne C. Wolverhampton Ry. Co.* v. *L. & N. W. Ry. Co.*, L. R. 16 Eq. 439.

Actions for specific performance of executory contracts differ, remarks Mr. Justice Fry, from actions for the performance of trusts in that a contract being a legal right and a trust an equitable one the remedy for breach of the former is in the alternative specific performance or damages, the remedy for the latter only the equitable one of specific performance. Fry on Specific Performance, p. 11. But this difference though interesting on historical grounds is now not very material in practice. The learned Judge's words are—

"From actions for specific performance we must distinguish those cases in which by reason of fraud or the breach of some fiduciary relationship a constructive trust arises. Cases sometimes of a mixed nature have arisen: as for instance, when by a contract to give up part of an estate if purchased. A persuaded B not to compete with him as a purchaser. On A's refusal to abide by his contract, B might have sued him alleging at once the contract, and the breach of A's duty as agent." Fry, p. 12.—*Chattock* v. *Muller*, 8 Ch. D. 177.

Mr. Justice Fry in his treatise on the specific performance of contracts, wrote, § 6, "It is certain that the Roman law gave a title to damages as the sole right resulting from default in performance and did not enforce specific performance directly or in any other manner than by giving such a right to damages. It held to the maxim "Nemo præcise cogi ad factum." For this sweeping and all comprehensive negative, Pothier, the Frenchman, Jr. Ides Obl. Pt. Ch. II, Art. 2, § 2, is the only authority cited. Had other authorities been cited, we should still have held them insufficient when weighed against the texts of Gaius and Justinian's Institutes and Digest. If we take the three contracts: Depositum, Commodatum, Pegnus, we find that they possessed a common quality that the entrusted thing whether it belonged to the giver or not did not pass into the owership nor indeed with the exception of the pegnus into the juristic possession of the debtor and had to be restored in specie differing therein from

the mutuum where repayment of a like quantity of the same kind of article was the remedy enforced. Even in the mutuum the remedy is more akin to specific performance than to what the English lawyer technically calls damages. Quasi contracts also entail a large amount of specific performance and when Augustus gave validity to trusts he necessarily sanctioned their specific performance. 3 Justinian's Institutes, 14 Digest, 12 I. G. Gaius 3 G. O.

To all conveyances per æs et libram was added a contractus fiduciæ, the breach of which was punished with the civil and political disabilities of infamy.

Under the most ancient forms of Roman procedure, namely, the legis actiones the judge always gave back the thing itself. Gaius IV. 16. In the more modern form, namely, in the formulary actions a change was introduced. Gaius IV. 48. We need not dwell on the symbolical and pantomic acts in the most ancient actio sacramenti in which the parties physically took possession of the slave in dispute the turf the twig the brick the sheep which represented the land the tree the house or the flock. Of the next action "prejudices postulationem the injured state of the manuscript of Gaius prevents us being so positive. It was employed with regard to obligations. It was conducted either by a judge or an arbitrator with more equitable powers and the presumption therefore is that the arbiter could grant specific performance. Five hundred and ten years after the foundation of Rome the Lex Selia introduced the action of condictio where the obligation was for giving a definite sum and ten years afterwards the Lex Calpurnia extended the scope of the action to all obligations for any certain definite thing. These legal actions though superseded in a great measure by the Lex æbritia A. U. C. 573 and afterwards in the time of Augustus by the Leges juliæ were long retained in cases where the centumviri were judges that is in questions of querelian ownership and succession. In the second epoch of procedure when actions with definite formulas came into use and anything was sought to be recovered the condemnation in damage was only in the alternative nisi restituat unless the defendant restores. The magistratus moulded the formula according to the circumstances of the case and it is no violent presumption to suppose that nisi restituat was frequently replaced by nisi

faciat nisi perficiat. The actiones arbitrariæ. Gaius IV. 47, were, says Sandars, § 108, "especially adapted to secure the plaintiff receiving the particular thing which had been the subject of a contract and not its money value." The language of the interdicts—as to which see Griffith's Institutes of Equity is "Vim fieri veto—exhibeas—restituas," "I forbid you to have recourse to violence. You are to produce—you are to restore." In the third that is Justinian's epoch of procedure the condemnation was not merely a pecuniary one the execution transferred to the emptor bonorum the entire persona or legal existence of the debtor the most complete of all specific performances.

The passage cited from Pothier lays down what was French law for only one species of contract. Though he asserts that according to the law of France an obligation to do a thing does not entitle the creditor or obligee to compel its being done; yet he continues and says that an obligation not to do may be directly enforced in such a case as a right of way which is interrupted by a barrier or a ditch. Either of these obstacles the owner of the right may compel the delinquent to destroy or do so himself. Two further remarks may be made. Pothier is speaking of obligations generally not merely of those by contract. And the maxim "Nemo potest præcisè cogi adfactum" is not necessarily a maxim of the Roman Civil Law because it is expressed in Latin. We would not rashly assert that it is not to be found in any of the numerous books of Justinian. But the interpretation placed upon it is alien to the fifteenth and seventy-fifth of the rules of law. Qui actionem habet ad rem recuporandam ipsam rem habere videtur nemo potest mutare consilium suum in alterius injuriam. In French law the obligation to give by marriage settlement will and testament or otherwise is enforced specifically.

In Justinian's system we find touching contracts of sale.

(1) Actio empti whereby the seller could be compelled to perform his obligations or pay compensation. It was however a condition precedent that the buyer should have paid the price or offered it.

(2) Actio redhibitoria whereby the contract could be rescinded in consequence of faults in the thing sold. The seller received

back the thing sold with its produce and accessories; and the buyer the price with interest.

(3) Actio œstimatoria sen quanti minoris in which the party sought to reduce the price not to cancel the sale.

(4) Actio venditi whereby the seller could compel the buyer to observe his duties whether inherent in the contract or added by special agreement.

Grotius in his Introduction to Dutch Jurisprudence, ch. 31, s. 9, says while treating of Do ut des Facio ut facias.

"He who has already fulfilled anything on his part has a right to compel the other should he not have fulfilled his part to perform what has been stipulated or at least to compensate him who has fulfilled his part to the extent of his interest. But when the first fulfilment consists in giving then the party who has fulfilled has his choice either to compel the other to perform the stipulation or to reclaim what has been given by him that is in case the other party has not yet commenced on his part either to perform or to give and is therefore altogether uninjured or at least can easily be indemnified This also takes place in case the other had on his part delivered anything the dominion of which has been evicted for them the contract must also be considered on that side as not fulfilled. But if that which was first given did not belong to the donor then the contract would be considered as altogether null and whatever is given can be reclaimed as having been given without legal cause. Keesel in his commentaries on Grotius's Introduction wrote, section 512. "It properly follows from a correct interpretation of the civil law that a person who has promised to do an act may be condemned and compelled to perform the same and it appears to have been so held by the supreme court." The question is not without importance for in many of the English Colonies Dutch Law is administered. Burges F. & C. L. Venderlinden's Institutes of the Law of Holland by Henry, p. 198.

The German Reichscivilprocessordnung of the present day contains provisions respecting specific performance in §§ 769, 771, 773—775.

Equity looks on that as done which is agreed to be done; *e.g.*, if a piece of land is sold, but the vendor or purchaser dies before

day fixed for completion.—*Lewis* v. *James*, 32 Ch. D. 326; *Greenwood* v. *Turner*, W. N. 1891, Feb. 21.

The word performance is applicable only to affirmative agreements, the word appropriate to negative ones is observance. Lord Coke said, "A negative cannot be performed." Litt. 303b. Fry, J., said, "I have always understood that non-observance refers to negative covenants, non-performance to the affirmative covenants." 10 Ch. D. 757. Brett, L. J., said, "the court were prepared to hold that a forfeiture only in the event of a lessee wilfully failing or neglecting to perform any of the covenants does not apply to the breach of a negative one." 3 Ex. D. 82.

The disability of a married lady of the Hindu, Mahometan, Buddhist, Sikh, or Jaina religion to enter into a contract is neither removed by the Succession Act, s. 4, nor by the present Act. Being unable to enter into a contract, there can be no contract of hers to be enforced. She is still under the difficulties which English ladies in England and India until recently laboured under. A concise statement of the English system may interest the student of comparative jurisprudence and will still occasionally be useful to the practitioner. Possibly the principles may prove applicable to the changes even in Hindu, Mahometan, Buddhist, Sikh, or Jain societies, or to some of the wealthier members thereof.

Married Women.

Marriage create at Common Law such a legal identity of husband and wife that her capacity to enter into contracts, except as his agent, was destroyed; her rights and liabilities on existing contracts were most of them merged in him, the rights at least to revive if he do not reduce them into possession and she survives; the rents and profits of her real estate were transferred, and her power to dispose of an inheritance seriously curtailed. In Equity the rules of the common law relating to her freeholds, leaseholds, choses in action and other personalty obtain but a subordinate position. The right of dower exists, subject to the doctrines of jointure and equitable dower. She may enjoy property of any kind independent of her husband's control, which is called her separate estate. And she may claim a settlement out of her own property, and, in suits by creditors, have her husband's property marshalled in order to save

her paraphernalia. In Equity marriage is a sufficient consideration for a contract before the solemnization to settle their respective properties on themselves and issue. Collateral issue could not uphold a settlement on themselves against the common law claims of creditors or purchasers for valuable consideration. Settlements after marriage, and gifts from the husband to his wife, also receive the sanction of Equity, but not so far that they defeat the common law claims of others, unless the wife, by settling property of her own, has made herself a purchaser. The legal estate in and management of the wife's property ought to be vested in trustees.

Dower.

Before the Common Law Procedure Act, 1860, legal proceedings to obtain dower were commenced by an original writ under the Great Seal directed to the sheriff, and made returnable to the Common Pleas. This relic of the Chancery as the officina justitiæ to a superior Court of Common Law is now abolished.

Before the Statute of Uses, the use not being acknowledged at Common Law, dower did not attach thereto, though it might to the legal estate, unless prevented by Equity. At the present day the heir of a person seised as trustee or mortgagee may in Equity restrain proceedings by the widow to recover dower.

When most of the land was in uses, and there was little personalty in the country, it became usual to convey an estate to a woman in joint tenancy, the profits of which she would receive if she survived her husband, and which was called a jointure. The Statute of Uses declared that a proper jointure should be a bar to dower. Had it not been for this enactment, dower, which being a right could not be barred till it accrued and being a freehold could not be barred by a collateral satisfaction would during coverture have irrevocably attached to every use converted into a legal estate. An equitable jointure being founded on contract barred a legal jointure which depended solely on statute 3 & 4 Will. 4 c. 105—see Griffith's Institutes, 90-93—made many amendments in the law of dower and overruling the practice of conveyancers allowed it to attach to a trust estate. This Act was extended to India by Act XXIX of 1839, for English cases.

The Succession Act—see Griffith's Commentaries—abolishes the wife's right to dower as well as the husband's right as tenant by curtesy of the wife's land. This Act operates as a settlement of the wife's property to her separate use without restraint on anticipation. A Mahometan wife has no lien for deferred dower. 2 Ben. A. C. 306.

Separate Estate.

As uses formerly, like trusts at the present day, fell exclusively within the protection of Equity, and as a power is another name for the right to limit a future use or trust, it might be expected that many of the common law rules of conveyancing would be ignored in the case of married women. Accordingly we find that when an estate and a power to operate under the Statute of Uses are given to a married woman, as she could without fine or recovery, so now she can divest herself of the estate without the aid of the Fines and Recoveries Abolition Act.—*Taylor* v. *Meads*, J. (65), 166. The rule respecting equitable powers, that is, such as are conferred by the husband on his wife under marriage articles, has only been established after a conflict of authorities. Her full control over personalty and its produce was undoubted, but even to Lord Hardwicke it seemed strange that the woman's heir might be so disinherited—*Churchill* v. *Dibben*, Lord Kenyon, Notes of C. C. 68; such, however, seems to be the present rule, both on principle and the balance of authorities. For a piece of masterly reasoning on the subject, the reader is referred to the Treatise of Powers by Lord St. Leonards, ch. v., s. 1.

The question touching equitable powers is, however, subordinate in importance to the doctrines relative to separate use or estate, that is, the dominion possessed by a married woman over property independent of marital control. Since the writ of subpœna was devised no more sweeping changes have been introduced into our law than those which relate to the property of married women. Formerly(1) a wife could not take nor have any personal property independently of her husband, and though her heirs might at her death receive her lands, the profits during marriage went to the husband. Now, however, in Equity, she

(1) The English Married Women's Property Act has for marriages after January 1, 1883, adopted the principle of the Indian Succession Act.

may have, enjoy and dispose of real and personal property with equal facility and less liability than an unmarried woman. All that is requisite is that the donor or settlor, whether husband or any other person, express an intention that the property be hers independent of marital control. Tarsey's Trust, 1 E. C. 561. Though a trustee ought to be named and properly appointed, yet if this is omitted, the court will consider even the husband a trustee. The donor or settlor may limit her power of disposition by inserting the words "without power of anticipation," or "not by way of anticipation." If this is done, the property becomes inalienable during marriage, and such inalienability would arise again on a second marriage. Where on appointing to a separate use a restriction against anticipation which tends to a perpetuity is annexed, the life interest will be well appointed and the restriction void. These words were introduced by Lord Thurlow. If they are wanting she may freely dispose of the property to her husband or others, and bind the income and profits by her engagements with her creditors, and though not by mere breach of trust, yet by fraudulent acts; though it has been said that such engagements, and, pari ratione, such fraud, must refer to the property.—*Shattock* v. *Shattock*, M. R., April 23rd, 1866, ex. relatione the writer.

The separate use must be distinguished, in respect of conveyancing as well as of title, from the ordinary equitable estate. It is only in the case of the latter that Equity follows the law in requiring that in conveying it the usual formalities be followed, and in holding that it is affected by the general incapacity of a married woman to make a will. And accordingly in the leading case of *Taylor* v. *Mead*, J. (65), 166, Lord Chancellor Westbury decided that a devise of real estate to trustees upon trust, for the sole and separate use of a married woman and her heirs, gives her the same power of disposition by deed or will over the inheritance as she would have had if she were a feme sole. Of this case Vice-Chancellor Kindersley said that it is the first which holds that the corpus of real estate can be settled to a separate use.—*Troutbeck* v. *Boughey*, 2 E. C. 534.

It has been already remarked that a married woman can make her separate estate liable for her debts. By some it has been held that this liability is to be considered as originating, not in contract, but in an appointment, by intention implied from some

writing, of the estate to that purpose. Certain it is that the superior Courts of Equity do not allow a married woman to be arrested for a debt. Lord St. Leonards observes: Powers, 8th ed., p. 173, that there is no case which gives effect to her contracts against the corpus of her separate estate, and the prevailing opinion is, that it is not liable to answer general demands upon her. In *Johnson* v. *Callagher*, J. (61), 273, Turner, L.J., differing from Bruce, L.J., was of opinion that the cases were inconsistent, but that separate estate is liable for general debts. In *Shattock* v. *Shattock*, April 23, 1866, ex. relatione the writer, Romilly, M.R., differed from the view of Turner, L. J., and held, that where a married woman had a life interest, with power to appoint the reversion by deed or will, which she exercised by will, such reversion was not liable for debts. In Mrs. Matthewman's case, in which a married woman sought to have her name struck off the list of contributories under the winding-up of the Leeds Banking Company, Kindersley, V.C., stated the principle generally, that where the circumstances are such as to lead to the conclusion that a married woman is contracting not for her husband but for herself in respect of her separate estate, the separate estate will be liable to satisfy the obligation.

If the income has been paid to the husband, the wife can only recover a twelvemonth's arrears. She may dispose of the savings. Undisposed of savings go to the husband as next of kin.—*Fettiplace* v. *Georges*, 1 Ves. J. 48, Thurlow, L.C., Eldon, L.C., and Loughborough, L.C., however, expressed opinions that the savings go to him in his marital right. In a recent case, Wood, V.-C., held that an assignment by an intended wife of her future property, followed by a covenant of the intended husband to settle the after-acquired property of the wife, did not extend to a legacy for her separate use, though without clause of anticipation.

The Act to amend the law relating to Divorce and Matrimonial Causes in England, 20 & 21 Vict. c. 85, ss. 21—25, enacts that married women, deserted and with orders of protection, or judicially separated, may acquire property as femes sole, which, should the wife again cohabit with her husband, is to be held to her separate use, subject however to any agreement in writing made between them while separate.

Equity to a Settlement.

If a married woman's property was not so settled, as by conditional limitation or otherwise to secure the wife a proper provision in case of the husband's bankruptcy or death, she might on proper application, have the whole or part of her property settled upon her. The right is called her equity to a settlement.

The rule is, that it is immaterial whether her title accrued before marriage or after. The exceptions are (1), that as against a purchaser for valuable consideration of the husband's life estate in her inheritance or of his interest in her leaseholds she has no equity.—*Durham* v. *Crackles*, J. (62), 1174, Wood, V.-C. (2) Certain choses in action which are not assignable. Legal choses may be reduced into possession and so become assignable. Equitable are of two kinds—immediate and reversionary; *e.g.*, stock may be standing in the name of a trustee for A for life, then for B. The latter fund is not assignable till reduced into possession, even though all parties interested concur. It is true such parties may afterwards be bound by estoppel. Still the property being unassignable no equity to a settlement could be allowed. 20 & 21 Vict. c. 57, however, makes it lawful for a married woman to dispose of reversionary interests in personalty given by instrument made after 31st December, 1857, except when such interest was given by settlement, or an agreement for settlement on marriage. Though in the settlement the children's welfare is considered, yet the equity being the wife's she may waive the whole without their consent at any time before it is made; but her death will not defeat her children's interest in any settlement already initiated.(1)

The maxim Nemo potest transferre plus juris quam possidet applies when the entire estate in the property is the wife's. Assignees of a husband, even for a valuable consideration, are bound, and the claim is paramount to that of a set-off by an executor, but the maxim does not apply to a mere life interest, the reason being that otherwise family affairs would be too open to inspection.—*Tidd* v. *Lister*, 3 De G., M. & G., Cranworth, L.C. (3) But a payment previously to bill filed to the husband or his assignee by a trustee destroys her right, even though the trustee paying might have insisted on it.—*Murray* v. *Elibank*, 10 Ves. 84.

(1) Cf. Act IV of 1865, s. 35.

The amount depends on the circumstances of the party and the conduct of the parties. Where there is already a marriage settlement, the order will be made with respect to the wife's fortune and the existing settlement. Where the husband is insolvent and his conduct bad, even the income to which he is entitled for her support will be so settled.—In *Barrow* v. *Barrow*, 24 L. J., Ch. 267; 5 D., M. & G. 782. Turner, L.J., said: "The legal right of the husband to his wife's property is founded on the legal obligation to maintain her, and therefore, if owing to his misconduct, his wife is unable to live with him, this is a circumstance which cannot but affect the equitable consideration of his right. The misconduct of the wife diminishes her equitable right; and it has been held that an adulteress has no equity to claim a settlement."

If the domicile of the marriage contract is foreign, no equity to a settlement arises. Lex loci contractûs regit actum. An English woman married a person with a French domicile. He had previously been naturalized in France. The marriage ceremony was performed in the chapel of the English ambassador, marriage articles in the English form having been first executed. Romilly, M.R., held that the Code Napoléon did not apply, but that an equity attached to after-acquired property.

When money, stock, shares, or securities not exceeding 200*l.* in value, is or are ordered to be paid to a woman who marries, before payment the accountant-general's office has to draw for the money or transfer, and deliver the stock, &c., to the wife and husband on proof of the marriage, and an affidavit by them of no settlement; or, if there be a settlement, an affidavit by them identifying it, and one by their solicitor that it does not affect the property. Cons. Ord. I. rr. 1—3. Supreme Court Fund Rules 61.

In *Wilkinson* v. *Gibson*, 4 E. C. 162; V.-C. Wood decided that the same consequences as to property must follow the declaration of dissolution by the Divorce Court as if the marriage contract had been annihilated, and the marriage tie broken on that date; that those rights of the divorced husband which depended on the contract ceased at the same date. Accordingly, where at the date of dissolution the wife was entitled to a reversionary interest in a sum of stock which was not settled before

her marriage, and had been the subject of a post-nuptial settlement, and after the decree the fund fell into possession, and the divorced wife took steps to realize the fund, but before it was recovered, died; it was held that her executors were entitled.

(a) *Contracts which may be specifically enforced.*

To an action brought by purchaser against the executors of a vendor of estate for specific performance the defence raised was unsoundness of mind and incapability. It was held on the evidence that the vendor who was eighty years of age suffered from brain disease and insanity produced thereby as well as and distinct from insanity evidencing itself in delusions and also from general enfeeblement of mind. One of such delusions did to some extent enter into the matter of the contract but in the opinion of the court not so as to form the foundation of it. The medical evidence in effect was that the vendor though capable to some extent of transacting business was not competent to enter into the contract in question which however was reasonable and simple. There was strong lay evidence that the vendor perfectly understood the transaction. The court being of opinion on the whole evidence notwithstanding the medical testimony that the vendor was sufficiently sane at the time to understand and did understand the transaction granted specific performance.—*Birkin* v. *Wing*, 63 L. T. 80.

When once it is shown that a complete contract exists, further negotiations between the parties cannot without the consent of both get rid of the contract already arrived at. But further negotiations in the shape of a demand by one party for an important additional term is evidence that he does not consider that there is a complete existing contract and may exclude him from specific performance. 45 Ch. D. 431; 44 Ch. D. 616.

A lease of land with an iron furnace and mill and certain water rights for the purpose of working the same contained a covenant on the part of the lessees not to assign or under let without the consent in writing of the lessors "such consent not to be unreasonably refused or refused to a person of responsibility and respectability." The lessees agreed with a municipal corporation to assign to them and the corporation agreed with the lessees not to use the waters for manufacturing iron or steel. The lessors refused to consent to the assignment on the ground

that the corporation could not use the premises for the purposes for which they were intended. *Held*, that the plaintiffs had not shown that the lessors unreasonably refused their consent for the corporation not being capable of being a good tenant or assignee could not be said to be a person of responsibility.—*Harrison* v. *Corporation of Barrow in Furness*, January 12, 1891, 39, W. R. 250.

A parol agreement to grant a lease was decreed on the testimony of one witness confirmed by circumstances against the denial of defendant after part performance by delivery of possession. Morphett, 1 Swans. 173.

12. Except as otherwise provided in this chapter, the specific performance of any contract may in the discretion of the Court be enforced—

Cases in which specific performance enforceable.

Contracts are frequently made with a penal or other like sum. Whereupon the question arises what is the contract? Is it that one certain act shall be done with a sum annexed whether by way of penalty or damages to secure the performance of this very act? or is it that one of two things shall be done at the election of the party who has to perform the contract; namely, the performance of the act or the payment of the sum of money? If the former the fact of the penal or the other like sum being annexed will not prevent the court enforcing performance of the very act and thus carrying into execution the intention of the parties.—*Howard* v. *Hopkins*, 2 Atk. 371; *French* v. *Macale*, 2 Dr. & War. 269. If the latter the contract is satisfied by the payment of a sum of money and there is no ground for proceeding against the party having the election to compel the performance of the other alternative. Fry, Ch. III.

If the sum named is not a penalty but the agreed amount of liquidated damages the contract is satisfied by its performance or the payment of the money and the case at first appears to be within clause (*b*). Nevertheless the word "standard" though applicable to market and other lists respecting large classes of sales is hardly applicable to an individual agreement. In England the distinction between penalty and liquidated damages is so far as respects specific performance unimportant.—*City of*

London v. *Pugh*, 4 Bro. P. C. 395 and ineffectual to prevent the court enforcing the contract in specie. The simplest illustration of this is the ordinary case of a stipulation on the sale of real estate that if the purchaser fail to comply with the condition he shall forfeit the deposit and the vendor shall be at liberty to re-sell and recover as and for liquidated damages the deficiency on such re-sale and the expenses. Such a condition has never been held to give the purchaser the option of refusing to perform the contract if he pays the penalty nor to stand in the way of specific performance of the contract.

Where the contract to do or not to do the act is distinct from the obligation to pay the money it seems that either the contract or obligation may be sued on, but not both of them.—*Fox* v. *Scard*, 33 Bea. 328 of section 29.

Though the contract be alternative in form the court may clearly see that it is essentially a contract only to do one of the alleged alternatives. For instance where the penal sum is very small compared with the value of the property; where the benefit of the contract would result to one person or flow in one direction and the benefit of the sum if paid in another as in marriage settlements.—*Chilliner* v. *Chilliner*, 2 Ves. Sen. 528; where the sum reserved is single and the act stipulated for or against is recurring as in leases of farms.—*French* v. *Macale*, 2 Dr. and War. 269. On the other hand where the sum or sums made payable vary in frequency of payment or amount according to the thing to be done or abstained from the judges have in many instances found the payment alternative in intention as well as in form.—*Woodward* v. *Gyles*, 2 Vernon 119; *Rolfe* v. *Peterson*, 2 Bro. P. C. 436; *Magrane* v. *Archbold*, 1 Dow. 107, where, however, in addition to an increased rent that was a stipulation that the act provided against should be a forfeiture of the covenantors interest the sum was held to be a security only and not an alternative and the act restrainable.—*Barret* v. *Blagrave*, 5 Ves. 555. A lease giving the lessor the right to re-enter and avoid the lease on breach of covenant offers no impediment to the enforcement of the covenant specifically.—*Dyke* v. *Taylor*, 3 De G., F. and J. 467.

Apart from a trust specific delivery of a chattel is not as a rule decreed. But all persons obtaining a chattel with notice

of a trust are bound thereby.—*Pooly* v. *Budd*, 14 Bea. 34. A person declared himself to be a trustee of stock which he had purchased with the money of another. He was compelled to transfer it though but a chattel.—*Stanton* v. *Percival*, 5 H. L. C. 257.

A contract was made for the sale of certain immoveable property in the event of the vendor obtaining a decree establishing his title. He obtained a decree but allowed the limitation period to elapse. *Held*, that the period applicable was that in respect of specific performance. Act 1877, Art. 113; and not that in respect of possession of property, Art. 144.—*Muhiuddin* v. *Majlis*, I. L. R. 6 A. S. 231.

Though a delay of three years is an important point to be considered in exercising the discretion, a court of appeal even if the point were not taken in the court below should hold that the discretion had been rightly exercised. Omnia præsumuntur rite esse acta.—*Mokund* v. *Chotay*, I. L. R. 10 C. S. 1061. Where it appears that a third person not a party to the contract has a distinct interest which it is sought to declare null and void on an equitable ground the claim cannot be made part of the suit.—*De Houghton* v. *Money*, L. R. 2 Ch. Ap. 166 followed. S. C.

In a case under the law before this Act came into operation a Hindu induced the parents of a boy to give him in adoption by a promise to settle upon him his (the adopter's) property. *Held*, that there was an equity to compel the heir and legal representative of the adoptive father to perform his promise; and that the widow thirty years after her husband's death might waive the period of limitation and execute a valid deed of gift of the property to the adopted son.—*Bhala* v. *Parbhu*, I. L. R. 2 B. S. 67.

A suit for specific performance of a contract to give in marriage cannot be sustained, the remedy is an action for damages. The ceremony of betrothal does not in Hindu law amount to an irrevocable contract which the court will decree to be specifically performed. I. M. Gunput, I. L. R. 1 C. S. 74.

Where one party to a contract has for years been permitted to enjoy all the beneficial interest without being clothed with the full legal title as a lessee under an agreement or a shareholder unregistered the time under the former law would not be a bar by limitation. Griffith's Institutes, Max. XVI. So

under the present Limitation Act XV of 1877, Sch. II, A 111, the period of limitation where a date for completion is not fixed does not commence till the plaintiff has notice that the defendant refuses to perform.—*Ahmet* v. *Adjein*, I. L. R. 2 C. S. 323. Griffith's Limitation Commentaries.

A kaboolent between a Zemindar and Government giving the latter power to drain the zemindari is not in the absence of a distinct agreement by the Government an instrument which a court of justice would enforce before the present Act.—*Chunder* v. *Collector of Midnapore*, I. L. R. 3 C. S. 464.

Specific performance of an agreement to mortgage land out of the jurisdiction of the court was refused in.—*Sreenath Roy* v. *Cally*, I. L. R. 5 C. S. 82. The parties being described as of Calcutta a money decree was made.

The difficulty in ascertaining what is a reasonable price on account of the extraordinary character of the property in containing coal or other valuable minerals is not a sufficient reason for refusing specific performance.

Where extra land has been agreed to be granted for the purposes of a colliery assignees of the colliery are not entitled to compel a grant even at a reasonable rate for the purpose of selling it.—*New Beerbhoom Coal Co.* v. *Bularam*, I. L. R. 5 C. S. 932. The doctrine of notice, Act XIV of 1882, ss. 261-262 applies to a complete contract.—*Chunder* v. *Krishna*, I. L. R. 10 C. S. 710.

In a suit for specific performance to purchase an indigo factory the defendant denied that the agreement relied on was final and alleged that the plaintiff had induced him to sign the agreement by representations as to the nature, the extent, the value and the net income of the property all of which representations the defendant charged were false and fraudulent to the knowledge of the plaintiff. The plaintiff in his affidavit of documents set out a list of title deeds evidencing his title to and the books of accounts and other papers relating to the property agreed to be purchased and these he claimed to withhold from the defendant's inspection on the ground that they were not sufficiently material at that stage of the suit. *Held*, that the documents were not protected.—*Sutherland* v. *Singhee*, I. L. R. 10 C. S. 808; Griffith's Civ. P. Code, 54 & 370.

The court ought not to make a decree for the specific performance of an agreement to lend a sum of money on mortgage only partly lent. The proper remedy would be an action for damages or for redemption. I. L. R. 2 M. S. 79.

An offer made by A to B was accepted by C purporting to act on behalf of B but in fact without authority from him. After acceptance by C, A withdrew the offer and B subsequently to A's withdrawal ratified C's acceptance. In an action B against A for specific performance. *Held*, that the ratification by B related back to the time of C's acceptance and therefore that A's withdrawal was inoperative.

The fact that a simple acceptance of an offer contains a statement that the acceptor will instruct his solicitor to prepare the necessary documents does not make the acceptance conditional.

The fact that a person seeking specific performance had in letters subsequent to those constituting a complete contract sought to introduce a new term which was resisted by the other party does not preclude a specific performance of the original contract.—*Bolton & Partners Limited* v. *Lambert*, C. A. 37, W. R. 435.

Respecting family compromises, see Moore 8 I. A. 275, and *Stapleton* v. *Stapleton*, 2 W. & T. and Griffith's Institutes.

An agreement for purchase subject to a formal contract being made is not capable of being specifically enforced.—*Hawkesworth* v. *Chaffey*, W. N. 1886, 2.

The court will not approve nor can an insolvency scheme be enforced in a suit for specific performance if the creditors have not accepted the scheme in the form agreed to by the defendants.—*C. A. Lucas* v. *Martin*, 37 Ch. D. 597.

Although the date for commencement of a lease is not stated in the letters containing and accepting the actual terms it may be gathered from previous correspondence on the same subject.—*Wood* v. *Aylward*, C. A., W. N. 1887, 215.

The doctrine of non-mutuality being a bar to specific performance, see Griffith's Institutes of Equity, p. 112, does not apply to a contract which to the knowledge of both parties cannot be enforced by either until the occurrence of a contingent event in this case until the plaintiffs were able to buy the land part of

which they proposed to sell to the defendant.—*Wylson* v. *Dunn*, 34 Ch. D. 569.

(*a*) when the act agreed to be done is in the performance, wholly or partly, of a trust;

The illustration clause is repealed by the Indian Trusts Act, see Griffith's edition, Schedule. Trusts are in some but very few respects analogous to contracts. The specific relief therefore in respect of the former is not an appropriate illustration of the specific performance of the latter kind of obligations. Trust must be distinguished not only from contracts but also from conditions and powers.

In England there is no precedent for a suit against trustees for the specific performance of their trusts in order to obtain the court's interpretation of these trusts. The application is either for administration or breach of trust and removal of trustees.—*Equitable Mortgage Co.* v. *Grenfell*, W. N. 1889, 228.

(*b*) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done;

A sale of public stock which is always in the market is within the clause but not the sale of shares of a particular trading company limited in number and not always to be had in the market.—*Cheale* v. *Kenward*, 3 De G. & J. 27.

Where a contract is to take several years in execution it is difficult to calculate the damages, as where 800 tons of iron are sold on the terms that they shall be delivered and paid for by instalments covering a number of years where timber trees are sold in a similar manner and where a lessee of alum works agrees to leave at the end of the lease a certain quantity of the alum that the business may continue to be carried on, in all these and similar cases specific performance will be decreed.—*Taylor* v. *Neville*, 3 Atk. 384; *Buxton* v. *Lister*, 3 Atk. 382; Nives, 15 C. D. 649. A railway company agreed to build and maintain an arch on the pleasure grounds of the plaintiff upon his withdrawing his opposition and to make it sufficiently large to permit a loaded carriage to pass under specific performance was decreed.—*Storer* v. *Great Western Ry. Co.*, 2 Y. & C., Ch. 48.

It was agreed on the dissolution of a partnership that a particular book should be considered the exclusive property of one of the partners and that a copy of it should be given to the other. A specific performance as to a copy of the book was decreed.—*Lingen* v. *Simpson*, 1 S. & St. 300. Agreements to form partnerships and to execute articles accordingly may also be decreed to be specifically performed athough they relate exclusively to chattel interests for damages are not in such cases an adequate compensation. 2 Ves. Sen. 629. Upon the like ground specific performance may be obtained of a covenant to grant a lease or to renew a lease; to insure against fire to sell the good-will of a trade and of a secret connected therewith; to assign an agreement between the defendant and a stranger for service to be performed by the plaintiff on payment of a stipulated compensation; so of a contract to keep the banks of a river in repair.—*Percival* v. *Carew*, 3 Atk. 83; *Bryson* v. *Whitehead*, 1 Sim. & Stu. 74; *Kilmorey* v. *Thackeray*, 3 Br. 65.

(*c*) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or

Where specific performance has been decreed of a contract to purchase railway shares the court will order the purchaser to pay the calls that have been made since the purchase and to indemnify the seller against all future calls in respect of the shares and to take proper measures to get himself registered. *Wynne* v. *Price*, 3 De. G. & Sm. 310. A contract being to pay the plaintiff a certain annual sum for his life and also a certain other sum by way of royalty on a proportion of a particular article to be manufactured by the defendant during the life of the plaintiff is such a one as the court will specifically enforce for damages could be calculated only by conjecture and to compel the plaintiff to take damages would be to compel him to sell the annual provision during his life for which he had contracted at a conjectural price.—*Ball* v. *Coggs*, 1 Bro. P. C. 30. And a contract with the creditors of an insolvent to take over at a certain rate the debts due to them will be specifically performed if brought into court for the dividends that may be eventually payable out of the estate are uncertain and conjectural. *Adderley* v. *Dixon*, 1 S. & S. 607.

(*d*) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

Illustrations *b* and *c* deal with contracts where the alternative remedy by damages is doubtful in its nature, extent, operation or adequacy. Illustration (*d*) respects contracts for the personal act or abstaining from acting by the defendant and where the thing contracted for and not damages was the object and purpose of the contract. Thus for instance, a covenant to renew a lease will be specifically decreed. 1 Madd. Ch. Pr. 309.—*Furnival* v. *Carew*, 3 Atk. 87. So a covenant to invest money in lands and settle it in a particular manner. So an agreement to settle the boundaries between two estates.—*Penn* v. *Baltimore*, 1 Ves. Sen. 444. So an agreement to charge an annuity on land.—*Wellesley* v. *Wellesley*, 4 M. & Cr. 554.

So an agreement to indorse a bill of exchange or promissory note upon a transfer thereof when it has been omitted by fraud, accident or mistake.—*Watkins* v. *Maule*, 2 Jac. & Walk. 242. So an assignment of an expectancy if made upon a valuable consideration.—*Meek* v. *Kettlewell*, 1 Phil. Ch. 342. Many other cases falling within the doctrine might easily be put; as the case of a covenant not to build upon a contiguous estate to the injury of an ancient messuage; of a covenant not to cut down timber trees which are peculiarly ornamental to the mansion of the covenantee; of a covenant not to erect any noisome or injurious manufacture on an estate adjacent to that of the covenantee; of a covenant not to carry on the same trade within a prescribed distance, and of a covenant that a house to be built adjacent to other houses should correspond with them in its elevation.—*Franklin* v. *Tuton*, 5 Mad. 469.

Even implied contracts though no injury may have been hitherto sustained but is only apprehended from the peculiar relation between the parties are decreed in some cases to be specifically performed. Thus a surety may bring an action to compel the debtor on a bond in which he has joined to pay the debt when due whether the surety has been actually sued or not. Milford's Eq. Pleading, 148. And upon a covenant to save harmless relief may be obtained under similar circumstances.—*Champion* v. *Brown*, 6 John 398. So where property

is covenanted to be secured for certain purposes and in certain events and there is danger of its being aliened or squandered the courts will interpose to secure the property for its original purpose.—*Flight* v. *Cook*, 2 Ves. 619; *Green* v. *Pigot*, 1 Br. Ch. R. 398. And generally it may be stated that in cases of contracts express or implied upon equitable principles the courts will interpose to preserve the funds devoted to particular objects under such contracts and decree what in effect is specific performance security to be given or the fund to be placed under the control of the court. Even contracts to execute mortgages may be specifically enforced and on the principle that injury is anticipated a receiver will be also appointed.—*Shakel* v. *Duke of Marlborough*, 4 Mad. R. 463.

Explanation.—Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved.

Illustrations

of Clause (*a*).—[*Repealed by Act No. II of* 1882.]

of Clause (*b*).—A agrees to buy, and B agrees to sell, a picture by a dead painter and two rare China vases. A may compel B specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance.

of Clause (*c*).—A contracts with B to sell him a house for Rs. 1,000. B is entitled to a decree directing A to convey the house to him, he paying the purchase-money.

In consideration of being released from certain obligations imposed on it by its Act of incorporation, a railway company contract with Z to make an archway through their railway to connect lands of Z severed by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this road, and also to construct a siding and a wharf as specified in the contract. Z is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for by money;

and the court may appoint a proper person to superintend the construction of the archway, road, siding, and wharf.

A contracts to sell, and B contracts to buy, a certain number of railway-shares of a particular description. A refuses to complete the sale. B may compel A specifically to perform this agreement, for the shares are limited in number and not always to be had in the market, and their possession carries with it the status of a shareholder, which cannot otherwise be procured.

A contracts with B to paint a picture for B, who agrees to pay therefor Rs. 1,000. The picture is painted. B is entitled to have it delivered to him on payment or tender of the Rs. 1,000.

of Clause (*d*).—A transfers without endorsement, but for valuable consideration, a promissory note to B. A becomes insolvent, and C is appointed his assignee. B may compel C to endorse the note, for C has succeeded to A's liabilities, and a decree for pecuniary compensation for not endorsing the note would be fruitless.

Contracts of which the subject has partially ceased to exist.

13. Notwithstanding anything contained in Section 56 of the Indian Contract Act, a contract is not wholly impossible of performance, because a portion of its subject-matter existing at its date has ceased to exist at the time of the performance.

All contracts are irrespective of the remedies subject to the condition that the subject-matter of the contract should be in existence when the time for performance comes. Thus a contract to sell agricultural produce grown on specified land is excused by unavoidable failure of the crop.—*Howell* v. *Coupland*, 1 Q. B. D. 258; *Taylor* v. *Caldwell*, 3 B. & S. 826; *Appleby* v. *Myers*, L. R. 2 C. P. 651.

It is a general maxim of law and of common sense that no one is compelled to do what is impossible. Coke Litt. 231 (*b*). The Teutonia, L. R. 3 Ad. & E. 396; 4 P. C. 171. Bristol and North Somerset Rail., 3 Q. B. D. 10, Mandamus.—*Dawson* v. *Oliver Massey*, 2 Ch. D. 753, Legacy.—*Roberts* v. *Bury Comn.*, L. R. 4 C. P. 759, Default of obligee.—*Jones* v. *St. Johns College*, L. R. 6 Q. B. 124. Absolute contract binding.—*Mayer* v. *Harding*, L. R. 2 Q. B. 410, Court practice.—*Q.* v. *J. J. of Surrey*, 6 Q. B.

D. 100, Court practice. In Story's Equity, 772-774, we find the following doctrines: If a plaintiff is in his original state as to that part of his agreement which he has performed but cannot perform the whole of his part equity will not decree specific performance. And where he does not continue in his original condition specific performance will be decreed notwithstanding a subsequent accident renders him incapable of performing the remainder.

Thus upon a marriage settlement A contracted to clear a manor of incumbrances sell some pensions and settled the manor when cleared and the sale money on his wife and issue. The wife's father agreed to settle £3000 a year on A for life and then on the issue. After the clearance but before the sale the wife died without issue. The court refused specific performance of the agreement to settle the £3000 on A seeing that his original condition had not been materially altered. Rep. temp. Finch, 445, 2 Freeman 35. But to illustrate the second case. If a man has contracted to settle lands on his wife and issue free from incumbrance a portion being to be received with her; and he sells part of his lands to disencumber the others and is proceeding to disencumber and settle the rest should the wife die without issue before the settlement be actually made he still shall have the portion. For he is not in his original condition he has sold part of his lands is not in default and therefore ought not to be prejudiced by the accident of his wife's death.—*Meredith* v. *Wynn*, 1 Eq. Ab. 71.

The Indian Contract Act, s. 56 includes the case of a contract becoming unlawful to which the present section makes no allusion. This, however, is immaterial if we take into account the proviso in section 4*a* that to give a right to relief the agreement must be enforceable at law.

Section 56 of the Indian Contract Act is thus penned: "An agreement to do an act impossible in itself is void. A contract to do an act which after the contract is made becomes impossible or by reason of some event which the promisor could not prevent unlawful becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew or with reasonable diligence might have known and which the

promisee did not know to be impossible or unlawful such promisor must make compensation to such promisee for any loss which the promisee sustains through the non-performance of the promise."

Illustrations.

(*a.*) A contracts to sell a house to B for a lákh of rupees. The day after the contract is made, the house is destroyed by a cyclone. B may be compelled to perform his part of the contract by paying the purchase-money.

(*b*) In consideration of a sum of money payable by B, A contracts to grant an annuity to B for B's life. The day after the contract has been made, B is thrown from his horse and killed. B's representative may be compelled to pay the purchase-money.

The principle is general that where the ownership of property has passed to the buyer he is bound to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller. Griffith's Transfer of Property Act, s. 55, 5(*c*). On the other hand the buyer is entitled to the benefit of any improvement in or increase in value of the property and to the rents and profits thereof. Sugden's V. & P. 341—2 and Griffith's Transfer of Property Act, s. 55, 6*a*.

The court has a discretion to make valid any dealings with shares between the presentation of a petition for winding up a company and the order made upon it. Thus the court of appeal held that an agreement for the sale of shares in a company entered into in ignorance that a petition had been presented was not enforceable or valid so as to make the purchaser a contributory. Emmerson's Case, L. R. 1 Ch. 433. Griffith's Indian Companies Act, 1882, s. 124. An advertisement is notice to the world and a vendor cannot shelter himself under a plea of ignorance. Oriental Bank, 28 Ch. D. 643.

The court may refuse specifically to perform a contract for the sale of shares and yet the party in fault may be liable in damages and to indemnify the vendor from all calls made after the sale.—*Chapman* v. *Shepherd*, L. R. 2 C. P. 228; *Rudge* v. *Bowman*, L. R. 3 Q. B. 689.

Though transfers of shares have not been executed by the transferees, yet if they have been acted upon and treated as

valid for so long a period that they cannot be impeached the non-execution will be treated as a mere irregularity. The fact that the transferors knew that the company was on the eve of being wound up voluntarily was held immaterial. *Held*, also that the winding up commenced on the presentation of the petition. I. R. Taurine Comp., 25 Ch. D. 118. Knowledge of the insolvency of the society might alter the decision. 24 Q. B. D. 394.

This illustration rests upon the maxim that "Equity looks upon that as done which is agreed to be done." Griffith's Institutes, p 22. The principle includes a case where an annuity is not the price but the subject of sale. Sugden's V. & P., 245.

Specific performance of part of contract where part unperformed is small.

14. Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

Illustrations.

(*a.*) A contracts to sell B a piece of land consisting of 100 bíghás. It turns out that 98 bíghás of the land belong to A, and the two remaining bíghás to a stranger, who refuses to part with them. The two bíghás are not necessary for the use or enjoyment of the 98 bíghás, nor so important for such use or enjoyment that the loss of them may not be made good in money. A may be directed at the suit of B to convey to B the 98 bíghás and to make compensation to him for not conveying the two remaining bíghás; or B may be directed, at the suit of A, to pay to A on receiving the conveyance and possession of the land, the stipulated purchase-money, less a sum awarded as compensation for the deficiency.

(*b.*) In a contract for the sale and purchase of a house and lands for two lákhs of rupees, it is agreed that part of the furniture should be taken at a valuation. The court may direct specific performance of the contract notwithstanding the parties

are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house.

Seller against Buyer.

Should the two bíghás be material as where the form the wharf frontage to a stream and the purchase is made by a wharfinger for the purposes of his stream specific performance would probably be refused.—*Pears* v. *Lambart*, 7 Bea. 546.

So where upon the sale of a house and four acres of land the seller could not make title to a small strip of land between the house and road so that persons passing could look into the windows it was held not a case for compensation.—*Arnold* v. *Arnold*, 14 Ch. D. 270.

So a seller cannot force the buyer to complete where there is a defect in title as where he has sold an underlease instead of a lease.—*Madeley* v. *Booth*, 2 De. G. & S. 718; *Camberwell, &c., Society* v. *Holloway*, 13 Ch. D. 760; an undivided share of an estate instead of an entirety; or a remainder expectant on a life interest instead of an estate in possession.—*A. G.* v. *Day*, 1 Ves. Sen. 218; *Collier* v. *Jenkins*, Yon. 295; or an estate subject to an undisclosed right to dig mines or undisclosed rights of easement prejudicial to the purpose of the purchaser.—*Seaman* v. *Vaudrey*, 16 Ves. 390; *Jones* v. *Rimmer*, 14 Ch. D. 588. Lord St. Leonards thus writes V. & P. 265.

"Should a buyer who is acquainted with a defect proceed with the purchase without objecting he is bound to complete and may forfeit a right to compensation." Sugden V. & P. 252. And should substantial objections arise in a suit the buyer may use them.—*Baskcomp* v. *Phillips*, 6 Jur. N. S. 363.

The law does not concern itself with trifles but if on a sale of a certain quantity more or less, a very large variance will be a good defence to the buyer. Sugden's V. & P. 269-270. And though parties frequently bind themselves by contract that a misdescription shall not annul the sale but be the subject of compensation the contract will be so interpreted by the court that the buyer shall not be compelled to pay for an estate twice as large as the one described double the price though he himself may enforce such contract.—*Price* v. *North*, 2 Y. & C., Exc. 620.

Buyer against Seller.

The buyer if willing to take what he can get may usually compel the seller to convey what he can and make compensation for the residue. Thus the buyer may take a term for 100 years instead of the fee simple.—*Barker* v. *Cox*, 4 Ch. D. 464; shares in a company though it be doubtful whether he will become a shareholder.—*Pool* v. *Middleton*, 7 Jur. N. S. 1262, a husband's share in a fee for the life of another person without the wife's remainder when he supposed the husband possessed the entire fee.—*Barnes* v. *Wood*, L. R. 8 Eq. 424; a moiety from A and B with compensation B having no title at all.—*Horrocks* v. *Rigby*, 9 Ch. D. 180; *Hooper* v. *Smart*, L. R. 18 Eq. 683; *McKenzie* v. *Hesketh*, 7 Ch. D. 675; but he cannot enforce a conveyance of a husband's interest in the fee simple of a wife who changes her mind and refuses to concur.—*Castle* v. *Wilkinson*, L. R. 5 Ch. 534.

The Transfer of Property Act provides that "a seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same." s. 55 (2).

Specific performance of part of a contract where the part unperformed is large.

15. Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.

Possession by a purchaser not as a tenant but under the contract being a continuous assertion of his right to enforce the contract obviates the consequences of delay or may do so.—

Mills v. *Haywood*, 6 Ch. D. 202; *Green* v. *Sevin*, 13 Ch. D. 589, Sugden's V. & P. 227.

The mere naming of a date for possession does not render the time an essential part of the contract if it appear otherwise from the terms of the agreement that it contemplated a possible postponement of the completion.—*Webb* v. *Hughes*, L.R. 10 Eq. 281. Where a business is sold as a going concern the presumption is that the buyer should on the day named be placed in a position to enter and carry it on.—*Day* v. *Luhke*, L. R. 5 Eq. 336; *Cowles* v. *Gale*, L. R. 7 Ch. 12; *Tilley* v. *Thomas*, 3 Ch. 61.

As to the measure of damages Mr. Justice Collett concludes the result of the authorities to be that ordinarily the buyer is entitled to the rents and profits and the seller to interest on the purchase-money from the date fixed for the completion even though the money were lying dead if the seller was not in default for the delay or the buyer gave no notice that the money was idle; but if the seller be in default and he has notice that the money is actually and fully appropriated he cannot claim interest. If no date is fixed interest is payable from the time the buyer takes possession or receives the rents and profits except in the case of a reversion when as the life estate is wearing out it is always payable from the date fixed for completion. A buyer taking possession before completion must pay interest from that date although he makes no profit by rent or otherwise out of the land meanwhile.—15 Ch. D. 122. If the interest exceeds the rents and profits and the seller is in default he must take the latter until a good title is shown and then interest only is allowed. Of course in the absence of default the express terms of the contract will govern. Should loss or deterioration arise during a delay in making out the buyer is entitled to compensation and if he has paid his purchase-money to interest on the compensation from the date of payment. The Transfer of Property Act—Griffith's Edition.

The underlessee of some property contracted to purchase it paid a deposit and accepted the title. By the contract the day fixed for completion was the date of the expiration of the lease and the purchaser was to pay interest on the purchase-money in default of completion. The purchaser remained in possession

but refused to complete or pay the purchase-money. He claimed to be in possession under the sublease not under the contract and offered to pay the rent. On motion for an order to the purchaser to pay the purchase-money into court. *Held*, that the purchaser had an option and must elect to pay the purchase-money into court within a month or to give up possession, and if he should give up possession that he must pay interest on the purchase-money from the day fixed for completion. There is no rule that a purchaser in possession loses this option by accepting the title.—*Greenwood* v. *Turner*, Kekewick, J., 39 W. R. 315.

A granted a lease to B of two rooms with a covenant for quiet enjoyment. Then A let a room above the two to C for dancing and other entertainments. A brought this action against B and C for an injunction to restrain such use of the upper room alleging that the dancing over his head and the behaviour of visitors on the stairs was a breach of the covenant and a nuisance. Kekewick, J., held that the words quiet enjoyment did not refer to noise but were restricted to enjoyment without interference with, without interruption of the possession; and explained to a like effect.—*Shaw* v. *Stenton*, 2 H. & N. 858; *Sanderson* v. *Mayor of Berwick on Tweed*, 13 Q. B. D. 547. He also held that the dancing was a nuisance giving a cause of action and so entitling to damages.—*Jenkins* v. *Jackson*, 40 Ch. D. 71.

Illustrations.

(*a*) A contracts to sell to B a piece of land consisting of 100 bíghás. It turns out that 50 bíghás of the land belong to A, and the other 50 bíghás to a stranger, who refuses to part with them. A cannot obtain a decree against B for the specific performance of the contract; but if B is willing to pay the price agreed upon, and to take the 50 bíghás which belong to A, waiving all right to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey those 50 bíghás to him on payment of the purchase-money.

(*b*) A contracts to sell to B an estate with a house and garden for a lákh of rupees. The garden is important for the enjoyment of the house. It turns out that A is unable to convey

the garden. A cannot obtain a decree against B for the specific performance of the contract; but if B is willing to pay the price agreed upon, and to take the estate and house without the garden, waiving all right to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree, directing A to convey the house to him on payment of the purchase-money.

Specific performance of independent part of a contract.

16. When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part.

In *Regina* v. *Mead*, 2 Ken. 279. Wilkes endeavoured to obtain repossession of his wife by writ of habeas corpus, Chief Justice Mansfield held good a return to the writ that Mrs. Wilkes was living apart under a separation deed but laid down the law that where a husband has not waived his right by such a deed "he has a right to seize his wife wherever he finds her."(1)

If by the wilful default of the seller rent has been lost or the land has been waste the purchaser may set off against such loss or deterioration interest payable by him. L. R. 8 Ch. 73 L. R. 8 Eq. 120. The buyer takes or is paid for timber blown or cut down after the contract. And the seller cannot claim for improvements made after the contract. Unless otherwise stipulated for expenses and outgoings are borne by the seller down to when the buyer might prudently take possession that is when a good title is shown.

In a draft lease prepared in pursuance of an open contract the lessor inserted the usual general covenant by the lessee to repair and leave in repair damage by fire only excepted. The lessee required that the words or "other casualty" should be added to the exception. *Held*, that the proposed words were so ambiguous that they ought not to be inserted.—*Crosse* v. *Morgan*, 37 W. R. 543.

(1) This right has recently been unsettled and denied by three of the Judges.

"One of the most frequent occasions on which courts of equity are asked to decree a specific performance of contracts is where the terms for the performance and completion of the contract have not in point of time been strictly complied with. Time is not generally deemed in equity to be of the essence unless the parties have so expressly treated it or it necessarily follows from the nature or circumstances of the contract. It is true that courts of equity have regard to time so far as it respects the good faith and diligence of the parties. But if circumstances of a reasonable nature have disabled the party from a strict compliance or if he comes promptly in point of fact to ask for a specific performance the suit is treated with indulgence and generally with favour by the court. But then in such cases it should be clear that the remedies are mutual that there has been no change of circumstances affecting the character or justice of the contract; that compensation for the delay can be fully and beneficially given; that he who asks a specific performance is in a condition to perform his own part of the contract; and that he has shown himself ready, desirous, prompt and eager to perform the contract. Even where time is of the essence of the contract it may be waived by proceeding in the purchase after the time has elapsed: and if time was not originally made by the parties of the essence of the contract yet it may become so by notice if the other party is guilty of improper delays in completing the purchase." Story 776.

In *Seton* v. *Slade*, Lord Chancellor Eldon decreed specific performance where the abstract though delivered very late and under a notice that the vendee would insist on his deposit with interest if the title should not be made out and possession delivered by the time of payment was received and kept without objection. 7 Vesey 265. See also, Sugden V. & P., Ch. 6.

"*Ought not*," the words are general and include illegality, want of equity and failure to satisfy the discretion of the court. The Indian Contract Act, s. 24, enacts that "if any part of a single consideration for one or more objects or any one or any part of any one of several considerations for a single object is unlawful the whole agreement is void." Such section impliedly assumes that one part of a contract may be lawful and another part unlawful and that the parts are separable and the contract divisible.

The different species of illegality may be divided into two classes; 1, where it exists at common law; 2, where it is created by statute.

1. At common law it is illegal to make a contract in general restraint of trade.—*Mitchel* v. *Reynolds*, 1 Smith's L. C. 410, to contravene public policy.—*Egerton* v. *Lord Brownlow*, 4 H. L. C. 1; to stifle a public prosecution for a crime, 13 Simons 513, for a future separation of husband and wife, but not for an immediate one; for an immoral purpose as to induce a woman to live with a man in a state of fornication, 1 Bl. 517, but giving compensation for past seduction is lawful even though the parties do not cease to cohabit. 3 Hare 532.

2. It is not necessary that the statute should contain words of positive prohibition. "Every contract made for or about any matter or thing which is prohibited or made unlawful by statute is a void contract though the statute does not mention that it shall be so but only inflicts a penalty on the offender because a penalty implies a prohibition though there are no prohibitory words in the statute." Holt, C.J., Carth. 252. And yet a penalty when merely for the protection of the revenue will not render subsidiary contracts void. 14 M. & W. 452. A contract does not become illegal by relation. Thus a legal practitioner may recover for work done though subsequently he neglect to renew his certificate. 6 M. & W. 270.

Whatever is entirely posterior to the illegal act may be supported as not tainted with illegality though arising out of the illegal transaction.—*Fisher* v. *Bridges*, Ex. C. 3; Ellis & Bl. 642.

A question not unfrequently occurs whether when a statute points out a particular mode for the performance of some act therein commanded its enactments shall be taken to be imperative or directory only in the former of which cases an act done in contravention of the statute would alone be void.—*See Pearce* v. *Morrice*, 2 Ad. & Ell. 96.

A contract is not illegal or void simply because private acts are interfered with by the act stipulated for. Thus where the consideration is a breach of contract or of trust the new contract may be enforced and the parties injured left to pursue their remedies. 10 M. & W. 284; 2 Vent. 23. But the circumstance would not be without weight in seeking specific performance.

As illegalities at law so also are iniquities in equity numerous. Respecting the latter reference may be made to Griffith's Institutes of Equity.

Defendant agreed to grant a lease to the plaintiff of a plot of land on condition of his building a house of a particular value thereon and insuring it in their joint names in a named Insurance Office but on default the defendant might re-enter and the agreement was to be void. The contract contained also a stipulation giving the plaintiff the option of purchasing the fee in two years. Plaintiff's default which resulted in his losing the lease did not preclude his purchasing the fee.—*Green* v. *Low*, 22, Beavan 625. The decree for specific performance of the good part of a contract is not modified on account of the bad part. And yet a court has a discretion in putting parties on terms and in awarding costs. A buyer is entitled to a charge on the property for the costs if any awarded to him of a suit to compel specific performance of the contract or to obtain a decree for the rescission thereof. Griffith's Indian Transfer of Property Act, s. 55 (6) *b*.

On the ground of "divisibility." Which however logically considered is not so good a term as independence a marriage settlement covenant to settle all future acquired property was specifically enforced in respect of policies of assurance. The covenant seemed objectionable because it included all future property and so might operate in restraint of trade.—*C. A. in re Turean*, 50 Ch. D. 5.

Bar in other cases of specific performance of part of contract.

17. The Court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections.

Purchaser's rights against vendor with imperfect title.

18. Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this chapter) has the following rights :—

(*a*) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the pro-

perty, the purchaser or lessee may compel him to make good the contract out of such interest;

See note to section 14.

The maxims of the common law were "An assignee is clothed with the rights of his principal." Broom, 434. "The grant of a future interest is invalid." Broom, 464: but they have been greatly modified and the latter one superseded by the maxim of Equity, "That is to be considered as done which is agreed to be done." Griffith's Institutes, Maxim II. And it is now universal law that a contract which engages to transfer to a purchaser or mortgagee property of which the vendor or mortgagee is not possessed at the time transfers the interest immediately on the property being acquired by him provided the contract itself purports to convey the interest in the property and not merely a license to seize.—*Holroyd* v. *Marshall*, 10 H. L. C. 191; *Reeve* v. *Whitmore*, 4 De. G. J. & S. 1; *Ascough* v. *Johnson*, 2 Vern. 66 Rawlin's Case, 4 Coke 52.

When the seller of a leasehold usually renewable acquires an interest by contract with the lessors at the time he made the agreement for sale that interest would pass to the purchaser although the contract was simply to sell the leasehold. If there was no such contract but the renewal was obtained subsequently to the sale but before the assignment to the purchaser the latter also would clearly have a right to claim the renewed lease though in this case the purchaser must pay the expenses of the renewal and in the former case also unless he really bought the whole interest at the price named including the benefit of the contract for renewal.—*Munro* v. *Taylor*, 8 Hare 51.

An imperfect title having been sold the purchaser after learning the defect bought the remainder, he was compelled to complete but allowed to deduct the price of the remainder.—*Murrell* v. *Goodyear*, 6 Jur. N. S. 93; *Hume* v. *Pocock*, L. R. I Eq. 662.

(*b*) where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence;

"*Bound*" that is against whom the court would decree specific performance at the suit of the vendor or lessor.

(*c*) where the vendor professes to sell unincumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee;

A purchaser cannot obtain relief against a vendor for any incumbrance or defect to which the covenants do not extend and which has not been concealed by the vendor or his agent. Sugden's V. & P., Ch. 13, Sec. 2. The maxim caveat emptor applies.

"*Professes.*" It is only in cases of fraud that a grantee of land who has sustained damages by reason of the liability of the land to contribution towards the payment of charges, as quit rents, can recoup as such damages the difference between what he obtained for the land and what but for the incumbrance he might have obtained. In other cases the parties can only be entitled to the amount payable on the incumbrance or its amount to be ascertained by calculation to which amount or value interest will have to be added in case the purchaser have not occupied or enjoyed the premises.

When a purchaser has not paid off the incumbrance but has remained in quiet possession of the land he cannot be relieved against his contract to pay the purchase-money in whole or in part on the ground of defect of title.—*Greene* v. *Tallman*, 20 N. Y. 191.

(*d*) where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let.

The conditions of a contract of sale of land provided that the purchaser should pay a deposit to be forfeited on his default in

complying with the conditions and that on such default the vendor might re-sell. The purchaser paid the deposit and accepted the title but failed to pay the residue of the price. The vendor then gave notice that the contract was rescinded and the deposit forfeited. Three years afterwards the property was again offered for sale and after the contract a defect in the title was discovered on the face of the abstract delivered to the first purchaser. The purchaser whose deposit had been forfeited thereupon brought an action for its recovery on the ground of mutual mistake and failure of consideration. *Held*, that having accepted the title and the forfeiture having taken place solely on account of his default that he was barred from so doing. 14 App. Cas. 429.

Ordinarily on a breach of contract to sell land arising from want of title damages for the loss of the bargain are not recoverable.—*Bain* v. *Fothergill*, L. R. 7 E. & I., Ap. 158.

The rule is otherwise in the case of a lease. The lessee in an action for breach of covenant for quiet enjoyment is entitled to substantial damages. Should he not have entered he is still entitled to the value of the lease. Should he have entered and be evicted to the value of the residue. Sedgwick's Cases, p. 84; *Locke* v. *Furze*, L. R. 1 C. P. 441.

19. Any person suing for the specific performance of a contract, may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

Power to award compensation in certain cases.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should

also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

Explanation.—The circumstance that the contract has become incapable of specific performance, does not preclude the Court from exercising the jurisdiction conferred by this section.

In respect of a continuing cause of action damages should be assessed down to the time of assessment. A right to damages may be forfeited by plaintiff's laches. 8 Jur. N. S. 873.

The particulars of sale of certain leasehold property described it as being occupied at an annual rent but omitted to state that the vendor as landlord paid the rates and taxes on the property the tenancy being a monthly one. The purchasers alleged that they were thereby led to infer that the tenancy was a yearly tenancy and that the tenant paid the rates and taxes. Accordingly they claimed compensation. The vendor asserted that the defendant had knowledge at the time of the sale of the true state of the case and produced evidence to prove that at the auction a person asked the auctioneer as to the two points and that he replied that the landlord paid the rates and taxes and that the tenancy was monthly. *Held*, that the evidence was admissible and fined the purchaser with knowledge and consequently precluded his claim for compensation. 62 L. T. 445.

Such uncertainty as prevents specific performance will not necessarily preclude the giving of damages. 38 Ch. D. C. A. 130. Where after sale but before the conveyance was executed a malicious injury was committed on the lands sold the court refused compensation to the purchaser. 25 L. R. Ir. 252. Griffith's Indian Transfer of Property Act, s. 55 *e*.

This chapter while authorising specific performance with compensation does not authorise the court to grant specific performance with an indemnity. For the former remedy is a final settlement between the parties, the latter leaves the door open to future litigation. For example where an estate sold is comprised with others in an original lease under which the

lessor has a right to re-enter for breach of covenants so that the purchaser might be evicted without any breach on his part then apart from express contract neither the purchaser would be bound to accept nor the vendor to convey the estate without an indemnity. Sugden's V. & P. 254. Satisfaction depends upon intention performance requires the doing of the act. Goldsmid, 1 Swans. 211.

A suit to have a mokurari patta enforced as against one co-sharer granting it and other co-sharers who repudiate it and in the alternative to have the salami paid for the mokurari lease returned is in substance a suit to enforce a contract to place the plaintiff in possession of the land under the patta and to declare his rights to it as against all the defendants. Compensation from the defendant grantor may be ordered by the court.—*Rajdhur* v. *Kalikristna*, I. L. R. 8 C. S. 963.

Illustrations

of the second paragraph:—A contracts to sell a hundred maunds of rice to B. B brings a suit to compel A to perform the contract or to pay compensation. The Court is of opinion that A has made a valid contract and has broken it, without excuse, to the injury of B, but that specific performance is not the proper remedy. It shall award to B such compensation as it deems just.

of the third paragraph:—A contracts with B to sell him a house for Rs. 1,000, the price to be paid and the possession given on the 1st January 1877. A fails to perform his part of the contract, and B brings his suit for specific performance and compensation, which is decided in his favour on the 1st January 1878. The decree may, besides ordering specific performance, award to B compensation for any loss which he has sustained by A's refusal.

of the Explanation:—A, a purchaser, sues B, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit, the patent expires. The Court may award A compensation for the non-performance of the contract and may, if necessary, amend the plaint for that purpose.

A sues for the specific performance of a resolution passed by the directors of a public company, under which he was entitled

to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The Court may, under this section, award A compensation for the non-performance.

Liquidation of damages not a bar to specific performance.

20. A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

A contract to do certain acts on payment of a sum of money is still legal. And should such its substance be clear and definite this section would not apply.—*French* v. *Maccale*, 2 D. & War. 274; *Rolfe* v. *Paterson*, 2 Bro. P. C. 436.

Illustration.

A contracts to grant B an underlease of property held by A under C, and that he will apply to C for a license necessary to the validity of the underlease and that, if the license is not procured, A will pay B Rs. 10,000. A refuses to apply for the license and offers to pay B the Rs. 10,000. B is nevertheless entitled to have the contract specifically enforced if C consents to give the license.

(b) Contracts which cannot be specifically enforced.

Contracts not specifically enforceable.

21. The following contracts cannot be specifically enforced:—

It appears to be unnecessary that all the terms of the contract have become performable before suit for specific performance. Specific performance was granted to a vendor though the purchase-money was payable in instalments some of which were not yet due.—*Nives* v. *Nives*, 15 Ch. D. 649. A want of punctuality in paying rent will not prevent a lessee enforcing a proviso for purchase on six months notice.—*Beasant* v. *Wood*, 12 Ch. D. 605.

In *Dendy* v. *Cary*, 9 Jur. N. S. 845, after the execution of a lease on the faith of a road being made in accordance with a

collateral representation specific performance was granted when the road was made to prevent its being broken up.

For a contract to give a girl in marriage money probably would be held an adequate relief; and a contract of betrothal depends so much on volition that probably it would not be specifically enforced. West & B. 1090. As to the sale of a medical practice see *May* v. *Thomson*, 20 Ch. D. 705. When an agreement has been in part performed the court is diligent in surmounting difficulties as to vagueness of terms.—*Hart* v. *Hart*, 18 Ch. D. 670.

The parties to a suit applied for an adjournment of it on the ground that they had agreed to refer the matters in difference between them in such suit to an arbitration. The court accordingly adjourned the suit and the matters in difference between them were referred to arbitration by the parties and an award was made thereon disallowing the plaintiff's claim. *Held*, that the further hearing of the suit was barred.—*Salig* v. *Junna*, I. L. R. 4 A. S. 546.

The mere act of filing a suit is not a refusal by the plaintiff to perform an arbitration contract. To bar a suit the contract must be an operative one and not one broken by all the parties. —*Tahal* v. *Bisheshar*, I. L. R. 8 A. S. 57.

All contracts to refer any matter to arbitration are included. Such a matter is a suit proceeding in court.—*Sheoamber* v. *Deodat*, I. L. R. 9 A. S. 168.

It is doubtful whether the actual submission of a matter in dispute to named arbitrators followed by the attempt of one of the parties to such arbitration to withdraw from the award being made falls within the concluding words of the section.— *Adhibai* v. *Kursandas*, I. L. R. 11 B. S. 199.

The filing of a plaint is not a refusal to refer to arbitration. —*Koornud* v. *Ohunder*, I. L. R. 5 C. S. 498.

(*a*) a contract for the non-performance of which compensation in money is an adequate relief;

Specific performance of an agreement to lend a sum of money has been refused.—*Sichel* v. *Mosenthal*, 8 Jurist N. S. 75; and of the agreement of a club union or voluntary association where

an improperly expelled member had no vested right of property in respect of the association.—*Rigby* v. *Connol*, 14 Ch. Div. 482. So of a contract by the donee of a power to leave stock. Hill, 1892, 3 Ch. 510.

Public convenience rather than equity to individuals is the justification of this clause.

The third illustration needs being qualified. The checks drawn upon any funds in the hands of a banker must not be presented until the funds or property have been a reasonable time in the hands of the banker. What is a reasonable time must be ascertained by reference to the particular circumstances such as the general magnitude and extent of the business of the bank, the pressure of business at the time or on the previous part of the day in question, &c.—*Whitaker* v. *Bank of England*, 6 C. & P. 700; 1 C. M. & R. 744; *Marzetti* v. *Williams*, 1 B. & Ad. 415. Exhaustion of the assets by payment of bills accepted payable at the bankers would be a defence for not paying ordinary drafts or cheques.—*The Agra* v. *Hoffman*, 34 L. J. Ch. 285; In *Rolin* v. *Steward*, 14 C. B. 595, where the bank dishonoured checks to the amount of £111-13-0 of a customer whose assets were sufficient and no special damage was proved the customer obtained £200 damages and the jury were inclined to give even more. Where a customer is an executor and intends to misapply his testator's money and the banker is cognisant of that intention he ought to dishonour the check. The existence of a personal benefit to the banker designed or stipulated for as a consequence of the payment would be strong evidence that the banker was privy to the breach of trust.—*Gray* v. *Johnston*, L. R. 3 H. L. 1.

Where bankers have taken up bills for a customer on the security of the produce of certain consignments and by a course of dealing with him had permitted him to draw upon his account current with them without reference to their advances on the consignments they cannot by charging the account with the advances in the absence of express notice treat it as overdrawn and accordingly dishonour the cheques before the consignments are realized.

Vagueness which may be considered important in specific performance does not necessarily prevent the granting of damages

for breach. The agreement was to enter into a lease on such terms as A B should approve.—*Foster* v. *Wheeler*, C. A. 38, Ch. D. 130.

(*b*) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;

The fourth illustration is taken from *Vickers* v. *Vickers*, L. R. 4 Eq. 529. But where a valuer had been named by both parties and afterwards he was prevented by one of the parties from acting, it was held that the contract was concluded and that the said party being in the wrong might be restrained.—*Smith* v. *Peters*, L. R. 20 Eq. 511. Again should the valuation contract be merely subsidiary as for the valuation of fixtures on a concluded sale of a house, the failure thereof will not prevent specific performance.—*Richardson* v. *Smith*, L. R. 5 Ch. 648; *Dinham* v. *Bradford*, L. R. 5 Ch. 519.

Illustration 6 ought, it is said, to be divided into two parts: (1) the letting; (2) the contract to cultivate. Mr. Collett thinks that B can obtain specific performance of (1). If so it would be only condition of his agreeing to cultivate in a particular manner. For "he who seeks Equity must do Equity." Griffith's Institutes. Mr. Collett's opinion is however by no means unexceptionable.

7. A contract which to the knowledge of both parties cannot be enforced until the occurrence of a contingent event—for example, until the plaintiffs buy land part of which they propose to sell to the defendant—then admits of specific performance. Even in England the want of "mutuality of remedy is no objection to the contract."—*Wilson* v. *Dunn*, 34 Ch. D. 569.

Illustration 9 ought to be compared with that to s. 12 c. and that to s. 22 III in which cases specific performance of building agreements were ordered but in both cases the land had been taken from the plaintiff on a definite condition. See also *Thames Valley Railway*, L. R. 2 Eq. 37. The owners of a ship had power to enter a dock and repair the ship on default

of the owners of the dock in doing so. The dock owners became bankrupt the court refused specific performance.—*Merchants T. Co.* v. *Banner*, L. R. 12 Eq. 18.

A contract to employ a carrier for a fixed period is not excused because the employer ceased to carry on business after his manufactory had been destroyed by fire.—*Turner* v. *Goldsmith*, C. A. 1891; 1 Q. B. 544.

(*c*) a contract the terms of which the Court cannot find with reasonable certainty;

On the 17th April 1889 the defendant wrote to the plaintiff's agent offering £800 for a freehold house at C with possession at Midsummer assuming the title to be satisfactory. The plaintiff's agent replied on the 18th accepting the offer subject to the owner's ratification which was subsequently obtained.

Further correspondence ensued in the course of which plaintiff's solicitors sent to the defendant's solicitor a draft contract containing special conditions of title which were objected to by the one side and insisted upon by the other. On the 20th of May the defendant's solicitor having discovered that the plaintiff was not owner of the minerals under the house repudiated the agreement. The plaintiff offered to purchase the minerals before the time for completion and to waive the objections to the special conditions but the defendant took no notice of the offer. The plaintiff obtained a conveyance of the minerals in September 1889. In an action for specific performance. *Held*, that assuming the existence of a concluded contract the defendant was justified in repudiating before the time for completion on the ground that the plaintiff was not owner of the minerals. —*C. A. Bellamy* v. *Debenham*, 60 L. J. N. S. Ch. D. 166.

The terms of the agreement may be sufficiently definite to constitute a contract but other terms as in an executory or even executed contract are difficult to ascertain.—*Chattock* v. *Muller*, 8 Ch. D. 177. An agreement for a lease without defining the term, for a partnership without fixing the capital will not be decreed to be performed.—*Marshall* v. *Berridge*, 19 Ch. D. 233; Oxford 1893, 3 Ch. 535. An agreement to erect a railway station without describing it will be ground for damages not for specific performance.—*Wilson* v. *Northampton Rail.*, L. R. 9 Ch. 279.

It is a maxim of law that, That is sufficiently certain which can be made certain. Certum est quod certum reddi potest. Noy, 9th ed., 265. For instance if a man make a lease to another for so many years as J S shall name. On J S naming the years the lease is good. Coke, Litt. 45 *b*.

Although the commencement of the term of duration be not mentioned in the letters accepting the actual terms it may be gathered from the previous correspondence on the same subject. —*Wood* v. *Aylward*, C. A. W. N. (1887), 215. An agreement in writing for the sale of a house did not by description ascertain the particular house but it referred to the deeds as being in the possession of A B named in the agreement. *Held*, that the agreement was sufficiently certain. 3 My. & K. 353. So in contracts for sale of goods it is frequently sufficient to refer to a quantity indefinite at the time of contract reducible afterwards to certainty. 1 B. & Ald. 12.

When the law requires a thing to be done without naming a period what is a reasonable period is a question of evidence and when ascertained is as fixed and certain as if specified by Act of the Legislature. 2 M. & S. 50.

An agreement for purchase subject to a formal contract being made was held incapable of being specifically enforced. W. N. (1886), 2. Such uncertainty as will prevent specific performance will not necessarily preclude the giving of damages. 38 Ch. D. 130.

(*d*) a contract which is in its nature revocable;

Where there is an agreement to grant a lease or to renew an old one with conditions as to its being revocable on certain defaults. If the defendant is already in a position to revoke it immediately after the decree it would be useless to order specific performance.—*Gourlay* v. *Somerset*, 1 V. & B. 68; *Gregory* v. *Wilson*, 9 Hare 683.

(*e*) a contract made by trustees either in excess of their powers, or in breach of their trust;

This is the case of *Harnet* v. *Yielding*, 2 Sch. & Lef. 549, but its soundness as a general proposition of law is questionable. Sugden, V. & P. 255. Parts of the contract it is said may be free from the taint of breach of trust.

As to leases see *Marshall* v. *Berridge*, 19 Ch. D. 233; *Nesham* v. *Selby*, L. R. 7 Ch. 406; *Williams* v. *Jordan*, 6 Ch. D. 517; *Hudson* v. *Buck*, 7 Ch. D. 682; *Rishton* v. *Whalmore*, 8 Ch. D. 467; *Williams* v. *Briscoe*, 22 Ch. D. 441.

Directors though not mere trustees are the special General Agents of the company. Their special authority is defined by the articles of association.

As between the company and third persons the contract cannot be enforced. As between the company and the directors or promoters all illicit gains must be refunded. It is the duty of the promoters to see that the directors are men who can exercise an independant judgment on behalf of the company. *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918; *New Sombrero Co.* v. *Erlanger*, 5 Ch. D. 118, 3 App. Cas. 1218. The solicitors are also liable on such transactions.—*Bagnal* v. *Carlton*, 6 Ch. D. 371.

(*f*) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers;

No contract made by the promoters of a company binds the company until the conduct of the company by its articles of association or by other method of adopting and ratifying the contract concludes the question. A promoter's contract which is in excess of the company's powers after formation cannot be so adopted or ratified.—*Shrewsbury* v. *N. S. Ry. Co.*, L. R. 1 Eq. 593.

(*g*) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;

The illustration is mainly taken from *Blacket* v. *Bates*, L. R. 1 Ch. 117, for the facts of which case see the note to s. 30.

(*h*) a contract of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist.

The Contract Act, s. 20 provides that "where both the parties to an agreement are under a mistake as to a matter of fact

essential to an agreement the agreement is void." A mistake is material or essential when it respects the object or rather purpose of the contract. The mistakes spoken of in ss. 14, 15, 16 and 26 are not mutual but unilateral. See Griffith's Institutes of Equity, *as to* Mistake 81-88.—*Cochrane* v. *Willis*, L. R. 1 Ch. Div. 58, death of tenant for life.—GRIFFITH'S FRAUD, MISREPRESENTATION AND MISTAKE, ch. xii.

For example:—A partner can no more revoke a general agreement to refer to arbitration disputes as to partnership matters than he can revoke any other stipulation in the partnership articles. But the question whether any particular matter in dispute is within the agreement to refer is one which the court will decide and will not leave to the arbitator.—*Piercy* v. *Young*, 14 Ch. Div. 200; *Law* v. *Garret*, 8 Ch. Div. 26.

See note to section 30.

(*b*), (*g*), (*h*). *Partnership.*

The equity doctrines concerning the contract of partnership may be divided into two classes: I. Those which relate to the connection existing between the partners. II. Those which relate to strangers.

I. The simplest form of the contract is where one person supplies capital, another skill and labour. The division of profits would be a question of some difficulty. But a division in proportion to the interest which the one might have made in the ordinary investments, and to the salary the other might have gained in the same employment, is perhaps equitable. Articles of partnership, when drawn by a skilful conveyancer, are in the form of mutual covenants: as to the name of the firm and object of the business; as to the partnership property and the proportions of the capital to be advanced; as to the mode of conducting the business; the use of the partnership name; keeping the accounts; division of profits; and as to the dissolution, &c. Equity sometimes grants specific performance of such articles in their entirety, or of subsidiary stipulations if clear and definite.—*Sichel* v. *Mosenthal*, J. (62), 275; yet the fact, that a partnership founded on litigation and distrust is not likely to be successful, is an objection not without weight. If accounts are to be taken, the remedy at law in covenant or assumpsit is, if not futile, very inferior; while in equity not

only may a breach of the contract, but acts injurious to the partnership, be restrained by injunction.

The bankruptcy or death of a partner dissolves his partnership. Generally the articles or the acts of the partners regulate a dissolution, but in order to prevent mischief a sudden dissolution in ill faith will be restrained.

Romilly, M. R., thus states the rights as they exist at death. —*Payn* v. *Hornby*, J. (58), 446. "A mortgage continues on the stock in trade as it continues from time to time. But on the death of a partner the case is altogether different. There is, as Lord Eldon very accurately expresses it, a quasi lien; there is, in point of fact, only a right to the specific property. The executors of the deceased partner are joint tenants with the surviving partners, and accordingly they are entitled to require the surviving partners to do one of two things, either to wind up the partnership business at once, or to fix the value of the testator's property and secure the payment of the amount.

"If the executors do not apply for a receiver, but simply file a bill for the winding up of the partnership, I apprehend that the new stock which has been acquired during the time the business has been carried on by the surviving partners belongs in the first place to the creditors who have been created by such subsequent dealings, and not to the creditors of the old partnership."

A portion of the value of a goodwill belongs to the deceased partner.

Real estate belonging to the partnership is, in equity, converted into personalty. And not only so during the lives of the partners; it descends to their personal representatives.

Our law admits of dissolution more readily than did the Roman, whence we have derived so many of our rules for contracts. "Our law," said Turner, L. J., "leaves either partner at liberty to dissolve where the partnership is not for a definite period, but in giving effect to the dissolution it deals with the case according to what is just and equitable between the parties. It has indeed refused to interfere with the legal rights of the parties where there has been no fraud . . . but it has exercised a wide discretion in these cases, at all events, as to

what shall be considered fraud." Bruce, L. J.'s opinion was the same.—*Burdon* v. *Barkus*, ex relatione the writer, and J. (62), 656.

Further, though the agreement is that the partnership shall last for a certain period, yet if the business cannot be carried on but at a loss, a decree for dissolution may be obtained. And where the conduct of a partner is such as to destroy all confidence in him, as where one of a firm of attorneys and solicitors sold out some trust funds and appropriated them to his own use, Lord Romilly held that the other partner may dissolve instantly.—*Essell* v. *Hayward*, J. (60), 690. The court will not compel partners to carry on partnership with the committee of a lunatic, for it might involve them in continual litigation of a very onerous and expensive character, inasmuch as any question which might arise would have to be decided by the Lords Justices at a necessarily great expense.—*Rowlands* v. *Evans*; *Williams* v. *Rowlands*, *The Times*, Nov. 11, 1861, M. R.

Partners, being agents, ought not to make a profit out of goods supplied to the firm; there is an exception in the case of a part owner of a ship acting as ship's husband, though he entered upon the duties without special agreement.—*Salter* v. *Adey*, J. (55), 930, V.-C. S.

The decree for dissolution sometimes orders accounts: (1) of the dealing and transactions; (2) of the assets; and (3) a sale of the assets, of which the goodwill may form a part. Some times the concern is sold, to use the phrase, as a going concern.

II. We now pass to the consideration of the contract with respect to strangers. Joint creditors have a priority in the administration of the partnership effects; a separate creditor in that of separate estate. Thus we find Vice-Chancellor Stuart ruling that joint creditors, who had received part payment out of the joint estate in bankruptcy, were not entitled, as separate creditors, to be paid pari passu with the separate creditors of a partner who died solvent before the bankruptcy, but only entitled to be paid out of the estate which remained after paying the separate creditors.

To the general rule that in running accounts the debtor, and on his omission the creditor, may apply a payment in discharge

of a particular item, the case of a dissolution, by death or otherwise, is an exception ; if the old account is carried on the items are applied in extinguishment of the balance due from the old firm. Instances of this are to be found in banking more frequently than in other partnerships.

The dissolution or winding up of joint stock companies is regulated by the Companies Act VI of 1862, and the Commentaries by Griffith. In this work we can but call attention to Contract Act, s. 239.

And save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced ; but if any person who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

Illustrations

to (*a*).—A contracts to sell, and B contracts to buy, a lákh of rupees in the four per cent. loan of the Government of India.

A contracts to sell, and B contracts to buy, 40 chests of indigo at Rs. 1,000 per chest.

In consideration of certain property having been transferred by A to B, B contracts to open a credit in A's favour to the extent of Rs. 10,000, and to honour A's drafts to that amount.

The above contracts cannot be specifically enforced, for, in the first and the second both A and B, and in the third A, would be reimbursed by compensation in money.

to (*b*).—A contracts to render personal service to B :

A contracts to employ B on personal service :

A, an author, contracts with B, a publisher, to complete a literary work.

B cannot enforce specific performance of these contracts.

A contracts to buy B's business at the amount of a valuation to be made by two valuers, one to be named by A and the other by B. A and B each name a valuer, but before the valuation is made A instructs his valuer not to proceed.

By a charter-party entered into in Calcutta between A, the owner of a ship, and B, the charterer, it is agreed that the ship shall proceed to Rangoon, and there load a cargo of rice, and thence proceed to London, freight to be paid, one-third on arrival at Rangoon, and two-thirds on delivery of the cargo in London.

A lets land to B and B contracts to cultivate it in a particular manner for three years next after the date of the lease.

A and B contract that, in consideration of annual advances to be made by A, B will for three years next after the date of the contract grow particular crops on the land in his possession and deliver them to A when cut and ready for delivery.

A contracts with B that, in consideration of Rs. 1,000 to be paid to him by B, he will paint a picture for B.

A contracts with B to execute certain works which the Court cannot superintend.

A contracts to supply B with all the goods of a certain class which B may require.

A contracts with B to take from B a lease of a certain house for a specified term, at a specified rent, "if the drawing-room is handsomely decorated," even if it is held to have so much certainty that compensation can be recovered for its breach.

A contracts to marry B.

The above contracts cannot be specifically enforced.

to (*c*).—A, the owner of a refreshment-room, contracts with B to give him accommodation there for the sale of his goods and to furnish him with the necessary appliances. A refuses to perform his contract. The case is one for compensation and not for specific performance, the amount and nature of the accommodation and appliances being undefined.

to (*d*).—A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically performed, for, if it were so performed, either A or B might at once dissolve the partnership.

to (*e*).—A is a trustee of land with power to lease it for seven years. He enters into a contract with B to grant a lease of the

land for seven years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced.

The directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders. They contract to sell it without any such sanction. This contract cannot be specifically enforced.

Two trustees, A and B, empowered to sell trust-property worth a lákh of rupees, contract to sell it to C for Rs. 30,000. The contract is so disadvantageous as to be a breach of trust. C cannot enforce its specific performance.

The promoters of a company for working mines contract that the company, when formed, shall purchase certain mineral property. They take no proper precautions to ascertain the value of such property, and in fact agree to pay an extravagant price therefor. They also stipulate that the vendors shall give them a bonus out of the purchase-money. This contract cannot be specifically enforced.

to (*f*).—A company existing for the sole purpose of making and working a railway contracts for the purchase of a piece of land for the purpose of erecting a cotton-mill thereon. This contract cannot be specifically enforced.

to (*g*).—A contracts to let for twenty-one years to B the right to use such part of a certain railway made by A as was upon B's land, and that B should have a right of running carriages over the whole line on certain terms, and might require A to supply the necessary engine-power, and that A should during the term keep the whole railway in good repair. Specific performance of this contract must be refused to B.

to (*h*).—A contracts to pay an annuity to B for the lives of C and D. It turns out that, at the date of the contract, C, though supposed by A and B to be alive, was dead. The contract cannot be specifically performed.

(*c*) *Of the Discretion of the Court.*

Discretion as to decreeing specific performance.

22. The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so;

but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal.

Story, 742 §—well observes "In truth the exercise of this whole branch of equity jurisprudence respecting the rescission and specific performance of contracts is not a matter of right in either party but it is a matter of discretion in the court not indeed of arbitrary or capricious discretion dependent upon the mere pleasure of the judge but of that sound and reasonable discretion which governs itself so far as it may be, by general rules and principles but at the same which withholds or grants relief according to the circumstances of each particular case when these rules or principles will not furnish any exact measure of justice between the parties. On this account it is not possible to lay down any rules or principles which are of absolute obligation and authority in all cases; and therefore it would be a waste of time to limit the principles or exceptions which the complicated transactions of the parties and the ever-changing habits of society may at different times and under different circumstances require the court to recognize or consider. The most that can be done is to bring under review some of the leading principles and exceptions which the past times have furnished as guides to direct and aid our future inquiries."

A purchaser who insists upon what he has no right to—such as an absolute warranty of title or guaranty—and who delays performing his part of the agreement for payment of the purchase-money on that account debars himself from a decree for specific performance.—*Bindeshri* v. *Mahant*, I. L. R. 9 A. S. 712; 14 I. A. 173.

Is multifariousness a question of merit within the Civil Procedure Code by Griffith, s. 578? Miller, J., answered in the affirmative; Pigot, J., in the negative. S. C.

Where time is an essential in a contract, its extension is only a waiver of the essentiality to the extent of substituting the extended time for the original time.—*Haji* v. *Shaik*, I. L. R. 12 B. S. 658.

On the sale of a house out of repair and in a somewhat dangerous condition time was held of the essence of the contract the monsoon season having begun. A letter extending the time

may do so conditionally such qualified waiver cannot be relied on if the condition is not performed.—*H. F. Mahomed* v. *S. Abdulla*, I. L. R. 12 B. S. 658.

A plaintiff having insisted on that to which he had no right, namely an absolute warranty of title, and having delayed performing his part of the contract because the warranty was not given was held disentitled by his conduct to a decree for specific performance.—*B. Prasad* v. *M. J. Gir*, P. C. I. L. R. 9 A. S. 705.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance :—

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

The burden of proving a sufficiently case to justify the court in interfering rests upon the plaintiff. . Griffith's Evidence Acts, p. 188.—*Davis* v. *Shepherd*, L. R. 1 Ch. Div. 421. In leases of minerals the same principles respecting divergence from a definite quantity more or less or thereabouts are acted upon as in leases of the surface. S. C.

The word conceal is active and impliedly forbids an intentional act but not mere silence unless there be a duty to speak. Sugden in his Treatise on Vendors and Purchasers has placed on his title page a maxim which summarises the doctrines of equity. A seller in good faith ought neither to increase the hope of advantages nor to obscure the buyer's judgment of disadvantages. See also *Shirley* v. *Stratton*, 1 Br. Ch. C. 140 and Sugden, ch. 7, s. 1. Of unreasonable and inadequate considerations, also *Lawrie* v. *Lees*, 7 App. Cas. 31.

If at a sale by auction the seller makes use of pretended biddings to raise the price the sale is voidable at the option of the buyer. Contract Act, 123.

Illustrations.

(*a*) A, a tenant for life of certain property, assigns his interest therein to B. C contracts to buy, and B contracts to sell, that

interest. Before the contract is completed, A receives a mortal injury, from the effects of which he dies the day after the contract is executed. If B and C were equally ignorant or equally aware of the fact, B is entitled to specific performance of the contract. If B knew the fact, and C did not, specific performance of the contract should be refused to B.

(*b.*) A contracts to sell to B the interest of C in certain stock-in-trade. It is stipulated that the sale shall stand good, even though it should turn out that C's interest is worth nothing. In fact the value of C's interest depends on the result of certain partnership-accounts, on which he is heavily in debt to his partners. This indebtedness is known to A, but not to B. Specific performance of the contract should be refused to A.

(*c.*) A contracts to sell, and B contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. B does not know of this circumstance, and A conceals it from him. Specific performance of the contract should be refused to A.

(*d.*) A's property is put up to auction. B requests C, A's attorney, to bid for him. C does this inadvertently and in good faith. The persons present seeing the vendor's attorney bidding think that he is a mere puffer and ceased to compete. The lot is knocked down to B at a low price. Specific performance of the contract should be refused to B.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

Other parts of the Act show that this clause proceeds on the assumption that the plaintiff is not in fault that the defendant's hardship arises from unforeseen circumstances. He is bound to save the plaintiff harmless. He that seeks equity must do equity. Griffith's Institutes.

Illustrations.

(*e.*) A is entitled to some land under his father's will on condition that, if he sells it within twenty-five years, half the purchase-money shall go to B. A, forgetting the condition, contracts, before the expiration of the twenty-five years, to sell

the land to C. Here the enforcement of the contract would operate so harshly on A that the Court will not compel its specific performance in favour of C.

(*f.*) A and B, trustées, join their beneficiary, C, in a contract to sell the trust-estate to D, and personally agree to exonerate the estate from heavy incumbrances to which it is subject. The purchase-money is not nearly enough to discharge those incumbrances, though, at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to D.

(*g.*) A, the owner of an estate, contracts to sell it to B, and stipulates that he, A, shall not be obliged to define its boundary. The estate really comprises a valuable property not known to either to be part of it. Specific performance of the contract should be refused to B, unless he waives his claim to the unknown property.

(*h.*) A contracts with B to sell him certain land, and to make a road to it from a certain railway-station. It is found afterwards that A cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to B, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.

(*i.*) A, a lessee of mines, contracts with B, his lessor, that at any time during the continuance of the lease B may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to B.

(*j.*) A contracts to buy certain land from B. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to B.

(*k.*) A contracts with B to buy from B's manufactory and not elsewhere all the goods of a certain class used by A in his trade. The Court cannot compel B to supply the goods, but if he does not supply them, A may be ruined, unless he is allowed

to buy them elsewhere. Specific performance of the contract should be refused to B.

The following is a case in which the Court may properly exercise a discretion to decree specific performance :—

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

The part performance must be shown to have been done in accordance with the agreement and to have referred thereto.—*Price* v. *Salisbury*, 9 Jur. N. S. 838. Although there be vagueness in the terms although the contract be such as if there had not been part performance would not have been specifically enforced yet the part performance induces the court to struggle to perform it entirely.—*Hart* v. *Hart*, 18 Ch. Div. 685.

Illustration.

A sells land to a railway company who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of A.

(*d*) *For whom Contracts may be specifically enforced.*

23. Except as otherwise provided by this chapter, the specific performance of a contract may be obtained by—

Who may obtain specific performance.

The chapter may be divided into two parts.

I Contracts. II Parties. The second part commences with this section.

(*a*) any party thereto ;

A description of vendor as solicitor to the vendor although the purchaser knew who the vendor was, was held insufficient to satisfy the statute of frauds.—*Jarret* v. *Hunter*, 34 Ch. Div. 182.

(*b*) the representative in interest, or the principal, of any party thereto : provided that, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall

not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed ;

"*Representative.*" By assignment of interest by acts of parties living or by devolution under a will or intestacy. See Griffith's Transfer of Property Act, s. 5 and Griffith's Succession Act.

"An agent is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done or is so represented is called the principal." C. A., s. 182. "No consideration is necessary to create an agency." C. A., s. 185. "Where acts are done by one person on behalf of another but without his knowledge or authority he may elect to ratify or disown such acts."—s. 196. If the agency is undisclosed specific performance will only be granted to the principal subject to the rights the other party would have had against the agent if he had been principal and subject to the rights and obligations subsisting between the agent and the other party to the contract. Ss. 231—232.

A mortgagee may enforce a lease made by his mortgagor in possession.—*Municipal Building Society* v. *Smith*, 22 Q. B. D. 70. The lease was made under a statutory power, but the general proposition seems sound.

(*c*) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder ;

Members whether legitimate or illegitimate. According to the law of contracts the true consideration for a compromise is the abandonment of a claim ; not the sacrifice of a right.—*Stapilton* v. *Stapilton*, 2 L. C. in Eq. 836 ; *Trigge* v. *Lavallee*, 9 Jur. N. S. 261. Fraud, error or mistake as to a matter furnishing the motive of either party but not a mistake as to the subject-matter compromised may avoid the instrument. Thus should the genuineness of a deed or will be assumed and it be a forgery or revoked the compromise fails. And a compromise of the amount of a claim the liability on the claim being assumed fails if there be no liability.—*Stockley* v. *Stockley*, 1 V. & B. 31.

As to ignorantia juris, the Judges remarks are somewhat vague and their decisions inconsistent. Juris WESTBURY, L. C., observed out to be translated here not law in general but that portion of law belonging to an individual. See Griffith's Institutes of Equity, p. 82, and *Beauchamp* v. *Winn*, L. R. 6 H. L. 223.

To sustain a family compromise there must have been a full disclosure of all material circumstances in the knowledge of the parties.—*Gordon* v. *Gordon*, 3 Swans. 400. Legal opinions must be disclosed and the state of accounts if known stated.—*Harvey* v. *Coole*, 4 Russ. 58. The real amount of the property must be shown.—*Groves* v. *Parkins*, 6 Sim. 576. Compromises where one party is likely to be influenced by natural or artificial relationship as that of guardian and ward, parent and child, priest and penitent, are watched by the court with jealous scrutiny. See Griffith's Institutes of Equity, pp. 186—198. Compromises may be presumed from the conduct of parties during a course of years as well as proved by documentary and oral evidence. Griffith's Evidence Acts, ss. 8, 13 and *Williams* v. *Williams*, L. R. 2 Ch. Div. 294.

A had a child C by a former marriage and married B and settled property giving C an interest therein. If C's provision was part of the reciprocal considerations between A and B, it is part of the marriage contract. If it was part of A's property left out of the marriage contract which A chose to settle on C. C's provision is a separate voluntary settlement.—*Price* v. *Jenkins*, 5 Ch. Div. 619; *Gale* v. *Gale*, 6 Ch. Div. 144.

(*d*) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman.

"*Due exercise of a power.*" Powers are Common Law Powers Equitable powers and in English instruments powers deriving their efficacy from the statute of uses. On the last class of powers we need not enlarge here.

A common law power whether of a trustee or person acting under a power of attorney enables the donee to pass the entire or modified legal dominion.

An equitable power is that of the beneficiary of trust property. See Griffith's Indian Trusts Act.

No technical or express words are necessary either in a deed or in a will to create a power if the intention be clear. Sugden 102.

Every circumstance required by the instrument creating the power to accompany the execution of the power should be strictly observed. But executions of powers which are invalid at law by reason of their failure to comply with all the requisites of the power are aided in equity if there be a good consideration. Marriage is a good consideration. The execution is not held valid but the court interferes and compels the person entitled in default of appointment to make good the defect.

The courts hold that there is an excess in the exercise of a power when there is a transgression either of the law or of the scope of the power. An excess though it is not a due exercise does not invalidate the part which is duly exercised. A power involving the exercise of personal discretion is not to be delegated. Sugden 179. Broom's Maxims.

A power may be adverse to the interest of a remainderman as where a family settlement gives the husband power to jointure the wife or charge the estate and gives the remainder to the son. But powers of sale and exchange and powers of leasing being for the better management of the estate are not adverse to the remainderman's interest.

(*e*) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant;

When a covenant extends to an existing thing parcel of the demise the thing to be done by force of the covenant is annexed and appurtenant to the thing demised and shall go with the land and shall bind the assignee though he be not bound by express words but when the covenant extends to a thing which is not in being at the time of the demise made it cannot be appurtenant or annexed thereto. For example a covenant to build a new wall upon the land demised shall bind the covenantor his executors or administrators but not his assignee.

2. A covenant for oneself and assigns to build a new wall or do anything else on the land will bind the assign, but a

covenant merely collateral as to build a wall on the grantor's land will not bind the assign who takes no benefit therefrom.

If a man lease sheep, stork or other personal things and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things leased were or such price for them and the lessee assigns the sheep over this covenant shall not bind the assignee for it is but a personal covenant and wants privity of estate between the lessor and lessee.

If lessee for years covenants to repair the houses during the term it shall bind all others as a thing which is appurtenant and goeth with the land in whose hands soever the term shall come as well as those who come to it by act in law as by the act of the party for all is one having regard to the lesssor. Reason requires that they who shall take benefit of such covenant when the lessor makes it with the lessee should on the other side be bound by the like covenants when the lessee makes it with the lessor. The assignee of an assignee has a right of action. So of the executors of the assignee of the assignee so of the assignee of the executors or administrators of every assignee for all are comprised in the word assignees for the same right which was in the testator or intestate shall go to his executors or administrators. Spencer's Case, 5 Coke 16, 1 Smith, L. C.

(f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;

Hitherto we have been speaking of covenants between lessor and lessee; but the obligation and benefit of a covenant may attach upon and belong to transferees of the entire ownership. See Griffith's Transfer of Property Act, s. 40 and *Duke of Bedford* v. *British Museum*, 2 My. & K. 552; *Catt* v. *Tourle*, L. R. 4 Ch. Div. 654; *Luker* v. *Dennis*, 7 Ch. Div. 227. More effect is now given to notice than at the time when *Keppel* v. *Bailey*, 2 My. & K. 557 was decided.—*Whatman* v. *Gibson*, 9 Sim. 196; *McClean* v. *McKay*, L. R. 5 P. C. 327.

An express covenant to do something new upon the land as to repair not only existing buildings but new ones to be erected

may on the equitable ground of notice bind an assignee though not named.—*Minshell* v. *Oakes*, 27 L. J. Ex. 194.

Covenants to repair to cultivate in a manner mentioned to use a house only as a private dwelling and not to carry on a trade thereon to paint; and to pay for injury to surface by mining touch the demised and run therewith; as also do implied covenants.

"*In remainder.*" The words are opposed to "in possession" in clause (*e*). Mr. Collett is of opinion that "remainder" is used to signify and include assignees of the reversioner. This is a very forced interpretation and unnecessary since such assignees have already been provided for by clause (*b*) and the doctrines of notice. So long as the reversion is not in possession the reversioner cannot bring an action for damages or injunction unless the injury threatens the reversion and is material thereto. For example a landlord cannot sue for a temporary nuisance which may yet be good ground for an action by the tenant.

(*g*) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation;

"*Public company.*" See Griffith's Indian Companies Act.

(*h*) when the promoters of a public company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company.

As to the converse case of the new company being liable on the contracts of the old company, see s. 27 (*d*.)

(e) For whom Contracts cannot be specifically enforced.

Personal bars to the relief.

24. Specific performance of a contract cannot be enforced in favour of a person—

When the enforcement of a contract would involve a fraud on the public as where the defendant's name was to appear as

editor on the title page of a book with which he had nothing to do, performance will be refused.—*Rost* v. *Marsh*, 16 Ch. Div. 395.

(*a*) who could not recover compensation for its breach;

Indian Contract Act, s. 236, is as follows: "A person with whom a contract has been entered into in the character of agent is not entitled to require the specific performance of it if he was acting in reality not as agent but on his own account." A publisher insisted upon having a title page which the author of the book considered untruthful. The publisher could not recover damages from the author who refused to supply material.—*Rost* v. *Marsh*, 16 Ch. Div. 406.

(*b*) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed;

(*c*) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract; or

(*d*) who, previously to the contract, had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration) had been made and was then in force.

"*In force*," that is a valid existing instrument though the time for its enjoyment may not have come; 25 (*c*) also passively protects a voluntary settlement. Section 54 (*g*) shows that such a settlement may be actively enforced against the settlor.

Illustrations

to clause (*a*).—A, in the character of agent for B, enters into an agreement with C to buy C's house. A is in reality acting, not as agent for B, but on his own account. A cannot enforce specific performance of this contract.

to clause (*b*).—A contracts to sell B a house and to become tenant thereof for a term of fourteen years from the date of the sale at a specified yearly rent. A becomes insolvent. Neither he nor his assignee can enforce specific performance of the contract.

A contracts to sell B a house and garden in which there are ornamental trees, a material element in the value of the property

as a residence. A, without B's consent, fells the trees. A cannot enforce specific performance of the contract.

A, holding land under a contract with B for a lease, commits waste, or treats the land in an unhusbandlike manner. A cannot enforce specific performance of the contract.

A contracts to let, and B contracts to take, on unfinished house, B contracting to finish the house and the lease to contain covenants on the part of A to keep the house in repair. B finishes the house in a very defective manner: he cannot enforce the contract specifically, though A and B may sue each other for compensation for breach of it.

to clause (*c*).—A contracts to let, and B contracts to take, a house for a specified term at a specified rent. B refuses to perform the contract. A thereupon sues for, and obtains, compensation for the breach. A cannot obtain specific performance of the contract.

Contracts to sell property by one who has no title, or who is a voluntary settler.

25. A contract for the sale or letting of property, whether moveable or immoveable, cannot be specifically enforced in favour of a vendor or lessor—

(*a*) who, knowing himself not to have any title to the property, has contracted to sell or let the same;

A has no remedy against B. But B may recover from A for the breach of contract damages whose measure varies with the facts of fraud or no fraud in A and of the contract being one of lease or sale.

(*b*) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt;

A title is too doubtful when there is a reasonable decent probability of litigation, 2 Atk. 19, but a mere suspicion of fraud does not enable a purchaser to reject the title.—*McQueen* v. *Farquhar*, 11 Ves. 467. A title is too doubtful where it would be irregular in the absence of special circumstances and these are not proved. 2 Hare 40. Though a title without notice may

in law be safely taken by a purchaser yet it will not be forced on him as he incurs a risk of notice being proved. 4 D.M.&G. 495.

"*Reasonable doubt.*" A court in cases of lease or sale cannot pronounce a judgment *in rem* that is binding on all the world but only a judgment between the parties. It therefore properly hesitates in decreeing specific performance which may be upset by a person having a better title.—*Mullings* v. *Trinder*, L. R. 10 Eq. 449. The doubt may arise as to what is a principle of law what ought to be the construction of a doubtful instrument or it may arise in evidence as to the satisfactory proof of a fact or as to presuming what cannot be directly proved such as that A had no children, B had no notice and so on. Respecting principles of law the court is bound to decide one way or the other. —*Alexander* v. *Mills*, L. R. 6 Ch. Div. 131; *Forster* v. *Abraham*, 17 Eq. 351. A decision on a doubtful title does not relieve a court of appeal from taking cognisance thereof.—*Bewley* v. *Carter*, L. R. 4 Ch. Div. 236; *Osborne* v. *Rowlett*, 13 Ch. Div. 781.

(*c*) who, previous to entering into the contract, has made a settlement (though not founded on any valuable consideration) of the subject-matter of the contract.

Illustrations.

(*a.*) A without C's authority, contracts to sell to B an estate which A knows to belong to C. A cannot enforce specific performance of this contract, even though C is willing to confirm it.

(*b.*) A bequeaths his land to trustees, declaring that they may sell it with the consent in writing of B. B gives a general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with C to sell him the land. C refuses to carry out the contract. The trustees cannot specifically enforce this contract, as, in the absence of B's consent to the particular sale to C, the title which they can give C is, as the law stands, not free from reasonable doubt.

(*c.*) A, being in possession of certain land, contracts to sell it to Z. On inquiry it turns out that A claims the land as heir of B, who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. A cannot compel Z specifically to perform the contract.

(*d.*) A, out of natural love and affection, makes a settlement of certain property on his brothers and their issue, and afterwards enters into a contract to sell the property to a stranger. A cannot enforce specific performance of this contract so as to override the settlement, and thus prejudice the interests of the persons claiming under it.

(*f*) *For whom Contracts cannot be specifically enforced except with a variation.*

Non-enforcement except with variation.

26. Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases (namely) :—

A definite written contract may be superseded by an oral one but cannot according to the ordinary rules of evidence be varied thereby. Griffith's Indian Evidence Acts, Ch. VI. And yet both writing and oral statements may in some cases form only one definite contract. When the law requires a writing it does not thereby declare that every written contract shall bind in the hands of the plaintiff it therefore does him no injustice by allowing the defendant to use oral evidence.

The plaintiff instead of specific performance with a variation may have damages where he has not been guilty of fraud but the defendant as plaintiff can only have specific performance with a variation which the other side would like.—*Woollam* v. *Hearne*, 2 L. C. in Eq. 468. As to fraud, mistake and surprise mentioned in clauses (*a*) and (*b*) see Griffith's Institutes of Equity and 1 Story 120*n*. 251*n*.

(*a*) where by fraud or mistake of fact the contract of which performance is sought is in terms different from that which the defendant supposed it to be when he entered into it ;

Deeds are legal instruments of more solemnity in ceremonial and of more conclusive effect than written contracts authenticated only by signature and not also by seal of the parties. A deed is altogether void where it has been procured by fraud and that regardless of the question whether the person executing

it could read or not. But two points have to be considered how far the fraud of one party really affected the other party's knowledge of the contents and how far the other is estopped by his negligence from taking advantage of it.—*Blackwood* v. *Gregg Hayes*, 277; *Foster* v. *Mackinnon*, 17 W. R. 1105, L. R. 4 C. P. 704; *Mason* v. *Ditchbourne*, 1 Moo. & R. 460; *Hunter* v. *Walters*, L. R. 7 Ch. Div. 75; *Fuvell* v. *Wright*, 35 S. J. 227. Griffith's Institutes of Equity, p. 82 and Griffith's Indian Evidence Acts, 229—240.

Summing up the effect of these authorities it seems correct to say that it is not safe to rely upon any such wide principle as that a deed is void if by reason of fraud it does not correspond with the intention of the party executing it. Griffith's Institutes, p. 82. This may or may not be the case. It may however be laid down with certainty that where it has been executed under a misapprehension of its contents due to fraudulent misstatement then it is absolutely void. Third persons who subsequently take conveyances in reliance upon the deed do so at their own peril unless then can succeed in the difficult task of proving negligence in which case possibly they may take advantage of the doctrine of estoppel. Griffith's Indian Evidence Acts, 229—240. The later of the cases cited tend to exclude from relief parties whose carelessness in executing a deed has conspired with fraud on the part of the person preparing the deed.

(*b*) where by fraud, mistake of fact, or surprise the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff;

Surprise that is arising from the act of the party. Confused and sudden impression rash and indiscreet conduct in entering into a contract unless so induced may still bind the contractor.—*Twining* v. *Morrice*, 2 Bro. C. C. 326, Story 120, 251.

Hence where there is no ambiguity either in respect to fact or law in the terms used there can be no mistake or surprise which will excuse the performance. A lessor signed an agreement for a lease for 7 or 14 years supposing erroneously that the law gave him as well as the lessee an option. *Held*, that there was no variation.—*Powell* v. *Smith*, L. R. 14 Eq. 85.

A contract which is contingent on the permission of the court to a sale by the certificated guardian of minors cannot be specifically enforced as originally entered into should the court fix a higher price.—*Narain* v. *Aukkoy*, I. L. R. 12 C. S. 152.

(*c*) where the defendant, knowing the terms of the contract and understanding its effect, as entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part, which adds to the contract, but which he refuses to fulfil;

(*d*) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce;

(*e*) where the parties have, subsequently to the execution of the contract, contracted to vary it.

Where a written agreement is varied in part by parol if it do not amount to a waiver of the contract but a variation by parol which has not been acted upon and which was made without consideration it cannot be made use of as a defence. Sugden's V. & P. 134. An agreement which is not a mere variation but is in substitution for the first is not within the section.—*Moore* v. *Marrable*, L. R. 1 Ch. Div. 217.

Illustrations.

(*a.*) A, B and C sign a writing by which they purport to contract each to enter into a bond to D for Rs. 1,000. In a suit by D, to make A, B and C separately liable each to the extent of Rs. 1,000, they prove that the word 'each' was inserted by mistake; that the intention was that they should give a joint bond for Rs. 1,000. A can obtain the performance sought only with the variation thus set up.

(*b.*) A sues B to compel specific performance of a contract in writing to buy a dwelling-house. B proves that he assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract, except with the variations set up by B.

(*c.*) A contracts in writing to let to B a wharf, together with a strip of A's land delineated in a map. Before signing the contract, B proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of A's land of the same dimensions, and to this A expressly assented. B then signed the written contract. A cannot obtain specific performance of the written contract, except with the variation set up by B.

(*d.*) A and B enter into negotiations for the purpose of securing land to B for his life, with remainder to his issue. They execute a contract the terms of which are found to confer an absolute ownership on B. The contract so framed cannot be specifically enforced.

(*e.*) A contracts in writing to let a house to B, for a certain term, at the rent of Rs. 100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing, so, with B's consent, A pulls it down and erects a new house in its place: B contracting orally to pay rent at Rs. 120 per mensem. B then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.

(g) Against whom Contracts may be specifically enforced.

Relief against parties and persons claiming under them by subsequent title.

27. Except as otherwise provided by this chapter, specific performance of a contract may be enforced against—

Plaintiff sued for specific performance of an agreement for conveyance of land and possession adding as parties persons who had subsequently to date of agreement purchased on sale in execution of a decree and alleging that they had purchased in bad faith and with notice of the agreement. *Held*, not to be a misjoinder.—*Gumani* v. *Ram*, I. L. R. 1 A. S. 555.

It is very doubtful whether the exception in *b* applies to a contest between a prior and subsequent lien upon the same property which has passed to the transferee under a sale in execution of a decree for enforcing the transferee's subsequent lien.—*Badri* v. *Daulat*, I. L. R. 3 A. S. 706.

A registered purchaser of land who buys with notice of a prior unregistered contract by his vender to convey to the plaintiff cannot resist a suit for specific performance on the plea of registration. See s. 50 of Registration Act, 1877.—*Kadar* d. *Ismail*, I. L. R. 9 M. S. 119.

Plaintiff being in possession of certain land as an incumbrancer under a registered instrument agreed orally with the mortgagor in 1885 to purchase it. The mortgagor sold the land to others who take the conveyance which was registered with notice of the plaintiff's mortgage and of the oral agreement with him. Plaintiff now sued for a declaration that the conveyance was not binding on him and for specific performance of the oral agreement. *Held* (1) that the suit was not bad for want of a prayer for delivery up and cancellation of the conveyance; (2) that the plaintiff's possession under his incumbrance together with agreement for sale was equivalent to the delivery of possession within the meaning of Registration Act, s. 48; (3) that the plaintiff was entitled to have the oral contract specifically enforced notwithstanding the subsequent registered sale.—*Kannan* v. *Krishnan*, I. L. R. 13 M. S. 324.

(*a*) either party thereto;

(*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

Equity looks upon that as done which is agreed to be done (Griffith's Institutes, Maxims) if it ought to be done. But this is only in respect of those who have a right to pray that it might be done. Story, 789—792.

The vendor becomes a trustee for the vendee and the vendee for the vendor.

(*c*) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

"*Defendant*" the word seems to be used inadvertently in place of the other party to the contract.

(*d*) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation ;

What is true of two individuals is true of two companies and two companies do not by amalgamating become jointly liable for each others engagements nor do the shareholders in one company become debtors to the creditors of the other company. A valid agreement to amalgamate binds the two companies between themselves but will not *per se* give the creditors of one company a *locus standi* against the other. An invalid agreement vitiates securities given by one company to the debtors of the other. Lindley, 2, 2, 2.

(*e*) when the promoters of a public company have, before its incorporation, entered into a contract, the company : provided that the company has ratified and adopted the contract and the contract is warranted by the terms of the incorporation.

Contracts made by promoters to pay sums of money to persons who might lawfully oppose the formation of the company and in consideration thereof agree not to do so but to use their influence in its favour have been held ultra vires.—*Caledonian Rail* v. *Helensberg*, 2 Mac. 391, but *Shrewsbury* v. *N. S. Rail.*, L. R. 1 Eq. 593 was otherwise decided.

Contract law does not allow the ratification of a contract made when the ratifier was not in existence. But a new contract to the same effect may be made by the would-be ratifier. When a defendant has adopted and enjoyed the benefit of the consideration he is bound thereby.—*Empress Engineering Co.*, 16 Ch. Div. 128. And a company taking a transfer of a contract takes it subject to equities as that of a patentee to a share of profits in a patent assigned. Nemo plus juris ad alium transferre potest quam ipse haberet. D. 50, 17, 54 ; 19 Ch. Div. 246.

Illustrations

to clause (*b*).— A contracts to convey certain land to B by a particular day. A dies intestate before that day without having conveyed the land. B may compel A's heir or other representative in interest to perform the contract specifically.

A contracts to sell certain land to B for Rs. 5,000. A afterwards conveys the land for Rs. 6,000 to C, who has notice of the original contract. B may enforce specific performance of the contract as against C.

A contracts to sell land to B for Rs. 5,000. B takes possession of the land. Afterwards A sells it to C for Rs. 6,000. C makes no inquiry of B relating to his interest in the land. B's possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C.

A contracts in consideration of Rs. 1,000 to bequeath certain of his lands to B. Immediately after the contract A dies intestate, and C takes out administration to his estate. B may enforce specific performance of the contract against C.

A contracts to sell certain land to B. Before the completion of the contract, A becomes a lunatic and C is appointed his committee. B may specifically enforce the contract against C.

to clause (*c*).—A, the tenant for life of an estate, with remainder to B, in due exercise of a power conferred by the settlement under which B is tenant for life, contracts to sell the estate to C, who has notice of the settlement. Before the sale is completed, A dies. C may enforce specific performance of the contract against B.

A and B are joint tenants of land, his undivided moiety of which either may alien in his lifetime, but which, subject to that right, devolves on the survivor. A contracts to sell his moiety to C and dies. C may enforce specific performance of the contract against B.

(*h*) *Against whom Contracts cannot be specifically enforced.*

What parties cannot be compelled to perform.

28. Specific performance of a contract cannot be enforced against a party thereto in any of the following cases :—

This section differs from the 26th in that the defence here goes to the whole of the contract.

(*a*) if the consideration to be received by him is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff;

Specific performance of an agreement to sell two rare china vases worth £200 for £40 was refused, the buyer knowing the real value the seller not.—*Falcke* v. *Gray*, 5 Jur. N. S. 645. Cf. Dowling, 2 J. & H. 544 artists picture.

Story 244—246, 251. Sugden's V. & P. 230—3.

Hardwicke, L.C. in a celebrated leading case divided frauds into five classes.—*Chesterfield* v. *Janssen*, 2 Ves. 125, 2 W. & T. "First, then fraud which is *dolus malus* may be actual arising from facts and circumstances of imposition which is the plainest case.

Secondly.—It may be apparent from the intrinsic nature and subject of the bargain itself such as no man in his senses and not under delusion would make on the one hand and as no honest or fair men would accept on the other which are inequitable and unconscientious bargains.

A third kind of fraud is which may be presumed from the circumstances and condition of the parties contracting and this goes further than the usual rule which is that fraud must be proved not presumed. But it is wisely established to prevent taking surreptitious advantage of the weakness or necessity of another which knowingly to do is equally against conscience as to take advantage of his ignorance. A person is equally unable to judge for himself in one as the other. Griffith's Institutes of Equity, pp. 188—200, and Griffith's Indian Evidence Acts, 204—218.

A fourth kind of fraud may be collected or inferred in the consideration of the court from the nature of the circumstances of the transaction as being an imposition and deceit on the other persons not parties to the fraudulent agreement. Such as marriage brocage contracts: Fraudulent preference by a compounding debtor. Premiums for recommendations to a public office.

Fifthly.—Relief is granted in the case of catching bargains with heirs, reversioners or expectants in the life of the father or other relative. These cases have been generally mixed compounded of all or several species of fraud; there being sometimes proof of actual fraud which is always decisive."

A false statement made knowingly, or without belief in its truth or recklessly is fraudulent. Derry, 14 A. C. 337.

Either the seller or the buyer may use the defence of inadequacy of consideration.

See Griffith's "FRAUD, MISREPRESENTATION AND MISTAKE," chs. v. and vii.

(b) if his assent was obtained by the misrepresentation (whether wilful or innocent), concealment, circumvention, or unfair practices, of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled;

The elements of defence are the same as those mentioned in s. 26 (*a*) & (*b*) but the defence is more extensive being to the whole contract and not to a part by way of variation.

It is not stated whether the promise is part of the contract, 24 (*b*) or an addition thereto 26 (*c*) the word any however seems to include promises of both kinds if they produce assent.

"*Misrepresentation*" being a defence fraud is a fortiori also. As to misrepresentation, see Indian Contract Act, s. 18 and note to s. 26 (*c*).

"*Concealment.*" To make mere silence fraudulent it must be the duty of the person silent to speak or his silence must be equivalent to speech. If a man knows that he has committed a serious trespass on his neighbour's property and wishing to screen himself from the consequences makes a proposal to buy it he ought to disclose the trespass to the party selling.—*Phillips* v. *Homfray*, L. R. 6 Ch. Div. 779; Denny 6 Ch. Div. 1; Baskcomb, 8 Eq. 100.

"*Circumvention*" is "any act fitted to deceive and includes undue influence." See Griffith's Institutes of Equity, pp. 188—200.

"*Unfair practices*" is a more sweeping term and includes coercion. See Griffith's Institutes, p. 175.

A person who really acts upon his own investigation or knowledge and not on the statements of the other party is not deceived thereby.—*Small* v. *Attwood*, 6 Cl. & F. 232.

A misrepresentation which is palpably false as a description that a house is in perfect repair which the purchaser sees has no roof or windows cannot be said to deceive him. I. C. A., s. 19. The same section avoids the defence if the plaintiff can prove that the defendant had the means of discovering the truth with ordinary diligence. Griffith's Indian Evidence Acts. But where the plaintiff cannot produce evidence either that the defendant knew facts to show that a material representation was untrue or that he said or did anything which showed that he did not rely on the statement, the untruth is a sufficient ground of defence or for rescinding the contract.—*Redgrave* v. *Hurd*, 20 Ch. Div. 22.

In an action for deceit if it is proved that the plaintiff did not rely upon the false statement complained of he cannot maintain the action.

If the name of a person improperly placed on the list of directors in the prospectus of a company it must depend upon the circumstances of the case whether it is a material misstatement. See Griffith's Indian Companies Act, 1882, s. 58.

If a statement by which a person says he has been deceived is ambiguous he must state the meaning which he attached to it.

A statement though untrue to the knowledge of the person making it may be held by the court too trivial to have influenced the other party, for example a misvaluation of the company's property to the extent of £3000 out of £301,000; the omission to state that interest was to be paid on instalments.—*Smith* v. *Chadwick*, C. A. 20 Ch. Div. 27.

"*Any party.*" This includes an agent but excludes an unauthorised person. Collett, p. 180.

The defence is available against an assignee who is personally free from blame but not available for an assignee on whom no deceit has been practised.—*Smith* v. *Clarke*, 12 Vesey 477.

A false statement as to the contents of a document though it is referred to in the particulars of sale as to be seen will be enough but an incomplete statement altogether true but imperfect.—*Smith* v. *Chadwick*, 20 Ch. Div. 45.

See Griffith's "FRAUD, MISREPRESENTATION AND MISTAKE," ch. xl.

(*c*) if his assent was given under the influence of mistake of fact, misapprehension or surprise: Provided that, when the contract provides for compensation in case of mistake, compensation may be made for a mistake within the scope of such provision and the contract may be specifically enforced in other respects if proper to be so enforced.

Under such a provision compensation may be obtained even after conveyance.—*Turner & Skelton*, 13 Ch. Div. 130; *Bos* v. *Helsham*, L. R. 2 Ex. 72; *Manson Thacker*, 7 Ch. Div. 620 to the contrary is overruled. But where a purchaser is evicted after a conveyance under a title to which the covenants do not extend he cannot recover the purchase-money.—*Allen* v. *Richardson*, 13 Ch. Div. 524.

Specific performance is not even partially decreed against one jointly interested but dealing for the entirety. Ravenscroft, 1895; 1 Q B. 685.

A mistake recklessly or negligently made ought not to be a defence. There should be something reasonably leading to it.—*Tamplin* v. *James*, 15 Ch. Div. 222.

A condition or proviso that an error in the particulars shall not annul the sale or be the subject of compensation will be no bar to compensation for a material deficiency. L. R. 8 Eq. 603. And no vendor who has been guilty of fraud or misrepresentation can avail himself of such condition.—*Brownlie* v. *Campbell*, 5 App. Cas. 937.

The revocation of an agent's authority does not take effect so far as regards third persons before it is known to them. I. C. A., s. 208.

"*Mistake.*" Error is the generic term and includes every deviation from what is right in rational agents and is opposed

to truth. Mistake is an error of choice such as children and careless persons are likely to make.

"*Misapprehension.*" Conceive is the generic term. We conceive of things as proper or improper, just or unjust, right or wrong, good or bad, this is an act of the judgment. Apprehension may be a synonym of conceit or a species thereof being sometimes the exercise of the power of simple perception sometimes of the powers of combination and reflection. We are said to apprehend or misapprehend the meaning of another "surprise." See note to 26 (b).

See Griffith's "FRAUD, MISREPRESENTATION AND MISTAKE," ch. xii.

Illustrations

to clause (*c*).—A, one of two executors, in the erroneous belief that he had the authority of his co-executor, enters into an agreement for the sale to be of his testator's property. B cannot insist on the sale being completed.

A directs an auctioneer to sell certain land. A afterwards revokes the auctioneer's authority as to 20 bighás of this land, but the auctioneer inadvertently sells the whole to B, who has not notice of the revocation. B cannot enforce specific performance of the agreement.

(*i*) *The Effect of dismissing a Suit for Specific Performance.*

Bar of suit for breach after dismissal.

29. The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be.

(*j*) *Awards and Directions to execute Settlements.*

On a motion by one partner to restrain two others from proceeding to arbitration it was held that as in the absence of the said partner arbitration proceedings by the two partners would be futile, an injunction ought not to be granted.—*Farrar* v. *Cooper*, 44 Ch. Div. 323.

The court has no general jurisdiction to restrain persons from acting without authority and an injunction cannot be granted

to restrain proceedings being taken out of court in the name of a person who has given no authority to use it. The court has jurisdiction over suits therein but not necessarily over outside arbitrations.—*London & B. Railway* v. *Cross*, 31 Ch. Div. 354.

Application of preceding sections to awards and testamentary directions to execute settlements.

30. The provisions of this chapter as to contracts shall, *mutatis mutandis*, apply to awards and to directions in a will or codicil to execute a particular settlement.

At one time the courts in England and Scotland treated themselves rather as being in the position of courts of appeal and examined whether or not the conclusion at which an arbitrator had arrived was sound both in point of law and of fact. "I think" said Lord Chancellor Halsbury "the only learned Judge who ever gave distinct expression to that view was Lord Thurlow." "Lord Thurlow says that it is no ground for setting aside an award that the conclusion was wrong otherwise it would be a ground for setting aside all awards, but his Lordship goes on to say that where certain facts are submitted to the arbitrator by the court the arbitrator must be considered to be somewhat in the position of a master" (that is an officer of the court) "and that the court when the matter comes back to them have to consider not only whether the master has acted according to law but whether he has arrived at a sound conclusion. His Lordship goes on to distinguish arbitrations in the more popular sense of the word and shows that where there are real arbitrations and where the parties have selected their judge in such cases you have to show a great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the court can interfere with his award.—(*Knox* v. *Symonds*, 1 Ves. Jun. 369.) And in the court of common pleas, forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading the court having come to the conclusion that the decision of the arbitrator was in the sense in which they understood the words erroneous in deciding on a question of law nevertheless held that the parties having submitted that question to the arbitrator it was for the arbitrator to determine it; in their own language the parties had agreed to accept the arbitrator's

decision upon the question of law as well as his decision upon the facts."—*Adams* v. *Great North of Scotland Railway Co.*, H. L. 1891, A. C. 45.

In the same case which must now be regarded as the leading case on arbitrations and awards, Lord Watson said : "The practice is at an end of reviewing an award upon the merits. It is a final decision in Scotland. But it may be set aside for want of jurisdiction. Misconduct in the course of the case whether in the proceedings which led to the award or in the award itself is ground for setting it aside. When the arbitrator has exceeded the limits of the agreement when he has disregarded any one of the express conditions in the contract of submission or any one of those important conditions which the law implies in every submission ; when he has violated the principles of justice and justice cannot be done between the parties without setting aside the award in any of these cases it may be set aside." 1891 A. C., pp. 45—47.

An award is considered in equity as amounting to an agreement between the parties on the terms pointed out by him. In order therefore that it may be specifically performed it must be certain, it must not go beyond or fall short of the agreement to refer ; such agreement should be free from hardship or unfairness in its terms or inducing thereto. Russell III, Ch. 4. —*Nickels* v. *Hancock*, 7 D. M. & G. 300. The arbitrator must decide the questions. A settlement by general arrangement which he considers fair is not sufficient. Russ. 2, 5, 4.

If one part of an award is bad and the other good, the good part if separable may be specifically enforced.

Arbitrators are to be considered as a tribunal administering justice. And the fabrication of evidence to be used before them is a penal offence.—*Q.* v. *Vreones*, 1891, 1 Q. B. 369 ; I. P. C. 192. An arbitrator's finding on a point is a res judicata. Gueret, 62 L. J. Q. B. 633.

"Courts of equity will not enforce the specific performance of an agreement to refer any matter in controversy between adverse parties deeming it against public policy to exclude from the appropriate judicial tribunals of the state any persons who in the ordinary course of things have a right to sue there. Neither

will they for the same reason compel arbitrators to make an award nor will they when they have made an award compel them to disclose the grounds of their judgment. The latter doctrine stands upon the same ground as the others that is to say in the first instance not to compel a resort to these domestic tribunals and on the other hand not to disturb their decisions when made except upon very cogent reasons.

When an award has actually been made and it is unimpeached and unimpeachable it constitutes a bar to a suit for the same subject-matter. And equity will in proper cases enforce the specific performance of an award which is unexceptionable and which has been acquiesced in by the parties if it is for the performance of any acts by the parties in specie such as a conveyance of lands, and such performance will be decreed almost as a matter of contract instead of an award.

The word award does not include a submission to arbitration which may eventuate in an award. But though the court will refuse specifically to enforce references to arbitration an inequitable refusal of a plaintiff to make such a reference may disentitle him to the aid of the court on the principle that he who seeks equity must do equity. (Griffith's Institutes, p. 25.) Thus where a deed was executed which created a lien for the amount of a solicitor's bill and advances, the amount of which was to be settled by arbitration and the arbitrator died before the award was made; in a suit seeking a reconveyance of the property, Baron Alderson *held* that the contract between the parties consisted of two parts; the first, admitting that some balance was due to the solicitor, and the second, a contract for a specific mode of ascertaining the balance that the latter part alone had failed that the former part remained entire and that the court would not decree a reconveyance without the plaintiff's consenting to do equity by having the amounts taken by an officer of the court. Fry, S. P. 661.—*Cheslyn* v. *Dalby*, 2 Y. & C. Ex. 170.

There are three grounds for setting aside an award; (1) mistake; (2) corruption or that they have proceeded contrary to the principles of natural justice as if without reason they will not hear a witness or decide without hearing one side; (3) exceeding the arbitration powers. (1) Mistake must be proved

by the admission of the arbitrator himself. The court is not a court of appeal and must hold that there is no mistake unless the arbitrator confess it.—*Duke of Buceleugh* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418; *Mills* v. *Society of Bowyers*, 3 K. & J. 66. (2) Corruption is a question outside the award and the evidence is not restricted as in cases of mistake. On a motion to set aside an award on the ground of the misconduct of an arbitrator it was alleged that he had been bribed. The only evidence of the truth of the allegation produced at the hearing was that of witnesses who had heard the arbitrator himself admit the fact in a conversation at which R the other party was not present. *Held*, that the allegation was not sufficiently proved to justify the court in setting aside the award as against R.—*Whitely and Roberts's Arbitration*, December 1890, H. C. 39 W. R. 248.

CHAPTER III.

OF THE RECTIFICATION OF INSTRUMENTS.

Instruments may be rectified on the ground of presumed mistake, or mistake directly proved.—On a bill for the rectification of a marriage settlement, where the mistake is common to both parties, relief may be decreed without a restitutio in integrum.—*Harris* v. *Pepperell*, W. N. (67), 265; but the defendant has an option to rescind. Bloomer, L. R. 13 Eq. 427.

Thus in cases of a loan made to two, where the instrument has merely expressed a joint obligation, equity has considered it joint and several; and a partnership debt has been treated as several, though it is at law only joint. And a post-nuptial settlement will be rectified in accordance with articles entered into before marriage. And where the articles are final, and the settlement made before marriage is expressed to be in pursuance thereof, it may be rectified.

But in order that a deed may be reformed, the mistake must have been an error common to both parties to the contract.—*Bradford* v. *Romney*, J. (62), 403, M. R.

Relief in cases of conveyances with respect to the parcels, and of settlements with respect to the limitations, have been

granted on the ground of a mistake by the attorney of instructions.—V. & P. 143.

In *Daniel* v. *Arkwright*, J. (64), 764. An appointment under a power to a child, her husband and children, by deed-poll, was rectified, and the limitation made to the child absolutely and alone, such being the intention of the appointors, which had been frustrated by the error of the solicitor.

In *Dendy* v. *Cary*, J. (63), 845, Vice-Chancellor Wood held the grantor of a lease liable even after execution on a parol promise to allow a right of way, on faith of which the contract was entered into and alterations made in the house.

When instrument may be rectified.

31. When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified; and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument, so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons, in good faith and for value.

In the absence of fraud, deceit or mutual mistake an allegation by a mortgagor that a sum in excess of the debt had been inserted in an instrument will not sustain a suit for rectification.—*Amanat* v. *Lachman*, I. L. R. 14 C. S. 308.

A contract implies a valuable consideration. A voluntary deed does not. It is included under the phrase other instrument in writing. If imperfect the court will not compel its completion. But when completed it may be rectified or rescinded on the same grounds as instruments for valuable consideration if the settlor wishes it. After the death of a voluntary settlor the settlement may be rectified in accordance with his proved intention if the error arose from fraud or mistake.—*Lister* v. *Hodgson*, L. R. 4 Eq. 30; *Hall* v. *Hall*, L. R. 8 Ch. Div. 430; *Phillips* v. *Mullings*, L. R. 7 Ch. Div. 244. If a volun-

tary settlement be impeached the onus of supporting does not necessarily rest on those setting it up. Hervey 18 Ch. Div. 668.

A mistake on one side may be a ground of defence to an action for specific performance or a ground for rescinding but not for rectifying an instrument.—*Harris* v. *Pepperell*, L. R. 5 Eq. 1; *Bloomer* v. *Spittle*, L. R. 13 Eq. 427.

Where articles of agreement are varied by a settlement before marriage the settlement is probably if it differs a new agreement; where by a settlement after marriage the presumption is that they were intended to follow the articles.—*Bold* v. *Hutchinson*, 5 D. M. & G. 558; *Cogan* v. *Duffield*, 2 Ch. Div. 44. Doubtful or ambiguous words in articles may fairly be supposed to be settled in their meaning by a subsequent instrument.

Where there is a joint loan and the bond to pay is joint only and not several there is a presumption that it ought to have been several also but the whole transaction must be scrutinised. —*Druiff* v. *Parker*, L. R. 5 Eq. 131; 1 Story 162—4. For it is both natural and equitable to suppose that two borrowers borrowed on a joint and several contract; but the presumption may be rebutted, see Griffith's Indian Evidence Acts, p. 222. And where a party to the joint contract is a surety positive evidence is requisite to fix him with a several liability. 2 Mer. R. 30.

"*Real Intention*," that is intention existing at the time of execution.—*Wilkinson* v. *Nelson*, 7 Jur. N. S. 480; *Walker* v. *Armstrong*, 8 D. M. & G. 531.

Where a matter has been completely overlooked on both sides where a term has not been determined on or discussed, or where the contract intentionally left out some terms rectification will not be applied.—*Parker* v. *Taswell*, 2 D. & J. 559; *Elwes* v. *Elwes*, 7 Jurist N. S. 302; 3 D. F. & J. 667.

"*Clearly proved*." This excludes rectification in cases where the evidence is nicely balanced where it is loose or equivocal or in its texture open to doubt or to opposing presumption. The documentary evidence is the first and the better evidence. Griffith's Indian Evidence Act, p. 166, and to displace evidence is admissible but should be stronger. Griffith's Indian Evidence Act, p. 176. Story well explains the reason of the admission of any evidence to contravene the written act of a party. "The

danger of setting aside the solemn engagements of parties when reduced to writing by the introduction of parol evidence substituting other material terms and stipulations is sufficiently obvious. But what shall be said where those terms and stipulations are suppressed or omitted by fraud or imposition? Shall the guilty party be allowed to avail himself of such a triumph over innocence and incredulity to accomplish his own base designs? That would be to allow a rule introduced to suppress fraud to be the most effectual promotion and encouragement of it. And hence the rule to admit parol evidence to reform all contracts where a fraudulent suppression, omission or insertion of a material stipulation exists. It is upon the same or rather a similar ground that such evidence is rendered admissible where there has been an innocent omission or insertion of a material stipulation contrary to the intention of both parties and under a mutual mistake. To allow it to prevail in such a case would be to work a surprise or fraud upon both parties and certainly upon the one who is the sufferer. "As much injustice would to the full" says Story somewhat strongly "under such circumstances as would be done by a positive fraud or inevitable accident." §§ 154, 155. Specific performance was decreed on the testimony of one witness and circumstances against a denying plaintiff. Morphett 1 Will. 100. Rectification was granted on proof of instructions and on affidavit of departure therefrom but *vivâ voce* evidence is better. Bonhote 1895, 1 Ch. Div. 742.

"*Clearly proved.*" Not only may evidence be given of the existence or non-existence of every fact in issue but also of relevant facts. Facts which are so connected with facts in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at a different time or place. So also are facts which are the occasion, cause or effect, immediate or otherwise of relevant facts or facts in issue or which constitute the state of things under which they happened or which afforded an opportunity for their occurrence or transaction. So is conduct and any fact which shows and constitutes a motive or preparation for any fact in issue or relevant fact. So is any fact necessary to explain or introduce a fact or which supports or rebuts an inference suggested by a fact in issue or relevant fact or which establishes the identity of any thing or person whose identity is relevant

or fixes the time or place at which any fact in issue or relevant fact happened, or shows the relation of parties by whom any such fact was transacted in so far as it is necessary for that purpose. So a fact is relevant which shows the existence of any state of mind such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person or shows the existence of any state of body or bodily feeling when the existence of any such state of mind or bodily feeling is in issue or relevant. Such a fact must show the existence of a relevant state of mind not generally but in reference to the particular matter in question. Facts not otherwise relevant are relevant; (1) if they are inconsistent with any fact in issue or relevant fact; (2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

The decisions of the courts, &c., on these universal rules of Evidence may be found in Mr. Griffith's Indian Evidence Acts, ch. II, pp. 49—73.

The evidence which the nature of the case leads to production in suits for rectification is of the following specific description. Preliminary documents such as articles of agreement, a rough draft letters and so on or merely oral evidence. Documents, as a rule, are more satisfactory evidence than slippery memory. All contracts in writing exclude generally oral evidence but they may be varied by a subsequent final contract. See Griffith's Indian Evidence Acts, ch. VI; 1 Story 160.

In England a marriage settlement was rectified after the death of the husband upon the uncorroborated parol evidence of the wife. She deposed that her husband a legal practitioner prepared it the night before the marriage and that it was brought to her for execution on the day of the marriage and that she had no independent advice. The court also held that as the settlement was one which it would not have sanctioned in the absence of agreement that the burden of proof,—See Griffith's Indian Evidence Acts,—was upon the representatives of the husband.—*Lovesy* v. *Smith*, 15 Ch. Div. 655. In *Hanley* v. *Pearson*, 13 Ch. Div. 545, a formal mistake was rectified after the husband's decease on the uncontradicted affidavit of the wife. 13 Ch. Div. 545. In *Clark* v. *Girdwood*, a settlement was rectified

by giving the wife the first instead of the second life estate. 7 Ch. Div. 9. A party with a right of rectification ought not to be guilty of laches.—*Turner* v. *Collins*, L. R. 7 Ch. Div. 329. In this case a son under undue parental influence executed a deed of voluntary gift to his father. Five years after he left his father's house. Two years after that he employed a legal adviser and mentioned the subject to him. Seven years after he commenced his action. *Held*, that he was barred by unreasonable delay. Conformation requires knowledge. Kempson, 10 Ch. Div. 15.

"*Rights acquired by third persons*," that is purchasers for valuable consideration without notice. As to whom see note to s. 3.

A mortgagor alleged that a sum in excess of his debt had been inserted in the mortgage. *Held*, that in the absence of fraud or mutual mistake the instrument could not be rectified. —*Amanat* v. *Lachman*, I. L. R. 14 C. S. 303.

A party to a contract of tenancy desiring to have it rectified or altered should bring his suit under this section. If he wishes to avoid part of the tenancy on the ground of fraud he must relinquish the whole of the land.—*Anarullah* v. *Koylash*, I. L. R. 8 C. S. 118.

The register of shareholders in a limited liability company (see Griffith's Indian Companies Act, ss. 58 & 59) is made upon those grounds amongst others which justify a rescission not a rectification of an agreement.

The court declined to rectify a settlement by giving the wife a power of appointment by will or in default an absolute interest if she survived her husband merely because the father the principal settlor had been the wife's agent and there had been no independent legal advice beyond that of the family solicitor. *Held* also that the father was the proper and natural agent for a daughter in preparing a marriage settlement.—*Tucker* v. *Bennett*, 38 Ch. Div. 1.

On an infant's marriage sanctioned by the court a deed was drawn up which included by mistake property which had been taken compulsorily but not the fund representing the property sold. The infant claimed the fund on coming of age. *Held*, that as the settlement was made and the marriage sanctioned

on the representation by her though an infant, that the property was hers she could not claim the fund against the trustees.—*Mills* v. *Fox*, 37 Ch. Div. 153. A fresh conveyance was ordered omitting a covenant inserted without instructions. Rob. 2 Price 190.

As money paid under process of the court cannot be recovered while the process exists so after an agreement has been worked out and the fund distributed under a judgment, rectification is impossible though the case be not one of *res judicata* the question of rectification not having been raised before the judgment.—*Caird* v. *Moss*, C. A. 33 Ch. Div. 22; *Marriott* v. *Hampton*, 7 T. R. 269.

Illustrations.

(*a.*) A, intending to sell to B his house and one of three godowns adjacent to it, executes a conveyance prepared by B, in which, through B's fraud, all three godowns are included. Of the two godowns which were fraudulently included, B gives one to C and lets the other to D for a rent, neither C nor D having any knowledge of the fraud. The conveyance may, as against B and C, be rectified so as to exclude from it the godown given to C; but it cannot be rectified so as to affect D's lease.

(*b.*) By a marriage-settlement, A, the father of B, the intended wife, covenants with C, the intended husband, to pay to C, his executors, administrators and assigns, during A's life, an annuity of Rs. 5,000. C dies insolvent and the official assignee claims the annuity from A. The court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for B and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity.

Presumption as to intent of parties.

32. For the purpose of rectifying a contract in writing, the Court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.

Principles of rectification.

33. In rectifying a written instrument, the Court may inquire what the instrument was intended to mean, and what

were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.

Specific enforcement of rectified contract.

34. A contract in writing may be first rectified and then, if the plaintiff has so prayed in his plaint and the Court thinks fit, specifically enforced.

The plaintiff was a Chatri by caste and the defendant was his guru or spiritual adviser a Brahman held in high consideration in the locality where he resided. The gift comprised the whole of the plaintiff's property and the only reason for its execution was the plaintiff's desire to secure benefits to his soul in the next world and his having heard the defendant recite the holy book called Bhagwat. Almost immediataly after the execution of the deed the plaintiff repudiated it and sued for its cancellation on the ground of fraud. *Held*, that having regard to the fiduciary relation subsisting between the parties the improvidence of the gift, the absurdity of the reason alleged for it and the principle recognised by Griffith's Indian Evidence Acts, s. 111, the burden rested upon the defendant to show that the transaction was made without undue influence and in good faith and in the absence of such proof the plaintiff was entitled to cancellation of the deed.—*M. Singh* v. *U. Pande*, I. L. R. 12 A. S. 523; *S. Prasad* v. *P. Lal*, 10 A. S. 535, approved.

A written agreement to build six houses was on parol evidence rectified after part performance by striking out the word six and substituting four and then specifically enforced.—*Olley* v. *Fisher*, 34 Ch. Div. 367.

Illustration.

A contracts in writing to pay his attorney, B, a fixed sum in lieu of costs. The contract contains mistakes as to the name and rights of the client, which, if construed strictly, would exclude B from all rights under it. B is entitled, if the Court thinks fit, to have it rectified, and to an order for payment of the sum, as if at the time of its execution it had expressed the intention of the parties.

CHAPTER IV.

OF THE RESCISSION OF CONTRACTS.

When rescission may be adjudged.

35. Any person interested in a contract (*in writing*)[1] may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely :—

The words of this section give a very meagre, nay an imperfect, view of the cases when rescission is lawful. That of Mr. Justice Fry is as follows : It is much more comprehensive and in every way better.

" The rescission of a contract necessarily constitutes a bar to its performance by either of the parties to it. It may result from—

(1) A simple agreement between the parties to rescind the contract.

(2) An agreement between the parties to new terms which put an end to the terms of the old contract.

(3) An agreement between the original parties and a third person by which the third person takes the place of one of the original contractors.

(4) An exercise of a power to rescind reserved in the contract to one or both of the contractors.[2]

(5) An exercise of the right to rescind which results to the injured party from fraud or mistake in relation to the contract.

(6) An exercise of the right to rescind which results to one party from the other party's absolute refusal to perform the contract or unreasonable delay in its performance.

(7) An exercise of the right to rescind which results to one party from the other party's having made performance impossible.

" *Void.*" The Contract Act, ss. 19 & 20, provide that " When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation the agreement is a con-

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(1) Repealed by Act IV of 1882.

(2) Such power must be exercised in good faith and not for the purposes of delay. Smith 1895 ; 1 Ch. Div. 385.

(3) Actual not legal fraud is now necessary. Pilgrim 39, S. J. 3.

tract voidable at the option of the party whose consent was so caused. A party to a contract whose consent was caused by fraud or misrepresentation may if he thinks fit insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representations made had been true. If such consent was caused by misrepresentation or by silence fraudulent within the meaning of section 17 the contract nevertheless is not voidable if the party whose consent was so caused had the means of discovering the truth with ordinary diligence. Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement the agreement is void.

"*Terminable.*" A contract is such when it contains a stipulation that in a certain event it may be ended. But conditions that if the vendor cannot deduce a good title or that the purchaser does not pay on an appointed day the agreement shall be terminable does not enable either party to terminate if he has the power of going on. A condition enabling the vendor to rescind instead of answering objections is more decisive, and gives an unrestricted power. Sugden 18, 16, 225. *Jackson and Oakshott*, 14 Ch. Div. 854. The right must be promptly exercised. V. & P. 211.

Independently of cases *a*, *b*, &c., rescission may take place in accordance with the contract. Purchasers brought an action for specific performance of a contract for sale of some real property which contained a proviso to the effect that the vendor might rescind on his being unable or unwilling to remove any objection to title. It appeared that the purchasers conditionally offered to give time for the removal and that the vendor in good faith objected to the conditions and was threatened with litigation in consequence. *Held*, that the vendor was entitled to rescind. 15 App. Cas. 42.

Laches or delay may be a good defence to an action for rescission, and more especially when accompanied with knowledge of the facts entitling to relief. A party against whom fraud is established must if he plead laches and delay prove that the other party had sufficient knowledge and the time of acquiring it.—*Lindsay P. Co.* v. *Hurd*, L. R. 5 P. C. 241. But see Griffith's Evidence Acts.

A plaintiff in *pari delicto* with defendant cannot obtain a decree rescinding a contract. The two parties had attempted to defeat the Government's right of escheat. I. L. R. 3 M. S. 215.

Where a purchase is made from a poor and ignorant man at a considerable undervalue the vendor having no independent advice a court of equity will set aside the transaction. This will be done in case of property in possession still more of that in reversion. Poverty, ignorance and absence of independent advice throw upon the purchaser the onus of proving that the transaction was fair, just and reasonable. 40 Ch. Div. 312.

A contract for sale under the direction of the court will not be set aside because the purchaser in giving information at the request of the court has not given all the information he possessed. The information retained was neither offered nor requested and respecting it there was no implied representation positive or negative, direct or indirect in the statement made.—*Coakes* v. *Boswell*, 11 App. Cas. 232.

A partner who had been induced to join the firm by material though not fraudulent misrepresentations is entitled to rescission although owing to the material one of the business he is not able to restore his copartners to their position at the time of the contract. He is not liable to them for money lent and goods sold by them to the copartnership. The House of Lords affirmed the decree generally but refused to decide whether the copartners ought to indemnify him against the general liabilities of the firm.—*Newbiggin* v. *Adam*, 34 Ch. Div. 582; 13 App. Cas. 308.

Where a company claim the rescission of a contract with a director on the ground that he did not disclose the fact that he was selling his own property they must do so in time to place the vendor in the position he was at the time of sale. The company having allowed a lease of the mine in question to lapse to the landlord it was held that they were too late to claim rescission.—*Ladywell Mining Co.* v. *Brooks*, 34 Ch. Div. 398; 35 Ch. Div. 400.

(*a*) where the contract is voidable or terminable by the plaintiff;

A misrepresentation may be innocent and yet fatal, for a

defendant asserting that to be a fact which is not so for his own benefit though he believe it to be so yet being material it is a fraud on the other party.—*Hart* v. *Swain*, 7 Ch. Div. 46. On the other hand a party injured must be in a position if he seeks relief to rescind entirely. He cannot take the benefit of part and obtain relief from the other part. Griffith's Institutes of Equity, p. 25, XII.—*Urquhart* v. *Macpherson*, 3 App. Cas. 838. Further the injured party must exercise his option of rescission before the rights of innocent third parties intervene such as creditors of a company in winding up. Griffith's Institutes of Equity, p. 26, XVI.—*Clough* v. *L. & N. W. Rail.*, L. R. 7 Ex. 35. Burgess's case, 15 Ch. Div. 511.

Accident and mistake affecting the foundation of a contract are grounds for rescission. Otherwise they may only require some amendment, addition, qualification or variation to render it just and reasonable and so enforceable. 1 Story Equity 694.

A condition of sale which requires that the purchaser shall assume that the vendor derived a good title under a will does not preclude the purchaser from showing that upon the true construction of the will a good title did not pass. 25 L. R. Ir. 307.

The words "notwithstanding any previous negotiation or litigation" in a condition of sale stipulating that the vendor may annul the sale if unable to satisfy any objection insisted on do not include litigation in which a judicial decision adverse to the vendor has been given. *Held* also that they refer to pending litigation and that after an order of the court that a good title had not been shown the vendor must pay the purchaser's costs of investigating the title. C. A. Arbib's Contract, 39 W. R. 305.

"*Voidable.*" The distinction between stipulations and conditions is important. A breach of the former is only ground for damages, the non-performance of a condition gives a title to rescind. In England a warranty is a stipulation, in Scotland a condition; so of a purchase by sample. But in England and elsewhere a purchase with warranty or by sample may contain a further stipulation for return of goods on breach.—*Conston* v. *Chapman*, H. L., L. R. 2 Sc. Ap. 250. In England when goods are ordered from a manufacturer as such there is an implied

warranty that the goods supplied shall be of his own make. In Scotland there is no such warranty.—*Johnson* v. *Railton*, 7 Q. B D. 445 & 455.

A transferee of shares cannot obtain rescission of contract to take shares and rectification of the register on account of misrepresentation in the prospectus even though the transfer be but nominal the transferee being his agent and the calls paid by him unless the company was informed that the applicant was only an agent.—*Hyslop* v. *Morel, Limited*, 1891. W. N. 19.

The words "notwithstanding any previous negotiation or litigation" in a condition of sale enabling the sellers to rescind without compensation cannot be construed to include a final judgment adverse to the title. Therefore the purchasers on rescinding the sellers had to pay the purchasers the costs of investigating the title. Arbib and Class Contract. C. A. 1891, W. N. 22.

(*b*) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff;

Prior to A B going through a form of marriage which both knew to be invalid. A made a settlement apparently good but really in consideration of the fictitious marriage of certain property upon B and they both lived together as man and wife and after A's death his representative sought to set it aside as founded upon an immoral consideration: this was refused. The Judge remarked the contract was executed not executory. To refuse aid to a woman seeking the price of her dishonour was one thing. But to take away from her the price when once paid was a different thing.—*Ayerst* v. *Jenkins*, L. R. 16 Eq. 275.

The general subject is well treated under the head *par delictum* in Broom's Maxims, p. 673.

"*More to blame.*" Where a fraudulent purpose has not been carried out money may be recovered back.—*Trimble* v. *Hill*, 5 App. Cas. P. C. 342.

One half of a bank note deposited to secure goods supplied to a brothel held not recoverable.—*Taylor* v. *Chester*, L. R. 4 Q. B. 309. Seizure under a bill of sale to secure money advanced on

a forged acceptance was not set aside on suit of trustee in bankruptcy. I. R. Mapleback, 4 Ch. Div. 150.

(*c*) where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the Court has ordered him to pay.

When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract either so far as regards the party in default, or altogether, as the justice of the case may require.

Illustrations

to (*a*).—A sells a field to B. There is a right of way over the field of which A has direct personal knowledge, but which he conceals from B. B is entitled to have the contract rescinded.

to (*b*).—A, an attorney, induces his client B, a Hindu widow, to transfer property to him for the purpose of defrauding B's creditors. Here the parties are not equally in fault, and B is entitled to have the instrument of transfer rescinded.

Rescission for mistake.

36. Rescission of a contract (*in writing*)[1] cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

Story observes that both accident and mistake when reaching the foundation of a contract are grounds for rescission. The two topics of accident and mistake are thus explained by Mr. Griffith in his Institutes of Equity.

(1) Repealed by Act IV of 1882.

Where there has been a transfer of property the restitution of the parties to the former position is by retransfer with an account of the profits and an allowance for depreciation.—*Erlanger* v. *N. S. P. Co.*, 3 App. Cas. 1218. Should the right to restitution be at an end that to damages may still exist.

Mistake.

The term Mistake differs from the logical term misapprehension. The latter denotes a failure of the mind in forming a clear conception of an idea, the former a failure in acquiring a knowledge of matters of fact. From misapprehension, indeed, inadvertence or surprise, mistakes frequently arise. But one is a cause, the other an effect. Some who hold with Lord Coke, 4th Institute, ch. 8, that the subjects of equity jurisdiction are three—covin, accident, and breach of confidence—make mistake a species of accident. But a mistake entitles to relief as affecting the inception of a contract, while accident affects the performance of a valid contract.

Ignorantia juris neminem excusat, ignorantia facti excusat. The law is a science, and it is culpable negligence to draw out or enter into a contract without learning and weighing the part of the science which relates to the act or contract. "But no person can be presumed to be acquainted with all matters of fact; neither is it possible, by any degree of diligence, in all cases to acquire that knowledge."—Story, § 140. Facti interpretatio etiam prudentissimos fallit.—Neratius; Phillimore on Jurisprudence, 96; and therefore an ignorance of facts does not import culpable negligence. But still, though the negligence be not gross, in many cases active diligence is requisite.

Cases are to be found in the law books in which an ignorance of law seems to have been the ground of relief; Lord Westbury suggested an ingenious interpretation of the maxim which reconciles apparently conflicting authorities. Jus may be used in the sense of general law, or of a portion which appertains to an individual, *viz.*, a private right.—*Cooper* v. *Phibbs*, H. L. 2, L. R. 2, 149.

It is a rule of general jurisprudence, which holds at Common Law and in Equity, that where there is no consensus ad idem, no mental acceptance of the proffer, there is no contract:

Non videntur qui errant consentire. Digest, 50, 17, 116, 2. Thus Lord Chancellor Thurlow in *Calverley* v. *Williams*, 1 Ves. J. 210, said, "That if it were proved that one party thought that he had purchased *bonâ fide* what the other thought he had not sold, it was a ground to set aside the contract:" and Sir T. Plumer, in *Clowes* v. *Higginson*, 1 Ves. & B. 524, speaking of Lord Chancellor Thurlow's opinion on this point, states also, as the view of Sir W. Grant, that the consequence of such a mistake would be, that in reality there was no agreement, but that the parties misunderstanding each other, the one proposing to buy one thing, the other to sell another, a contract so framed in mistake cannot consistently with justice be executed. Under similar circumstances a contract was ordered to be cancelled in *Price* v. *Ley*, J. (63), 295. But it is to be remembered that parties may agree to a contract concerning incidents of which, not going to the root of the consideration, they are willingly ignorant; they may also contract with respect to contingencies, the events of which cannot be foreknown, as in policies of assurance; they may also contract by way of compromise, upon supposition of a right or doubtful right. Thus Lord Chancellor Macclesfield, in *Cann* v. *Cann*, 1 P. Wms. 723, lays down the rule, "That an agreement entered into upon the supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on the one side or the other; and, therefore, the compromise of a doubtful right is a sufficient foundation of an agreement."

A compromise cannot stand if there is knowledge on the one side which is withheld from the other.—*Brooke* v. *Mostyn*, L. J., J. (64), 1114.

The rule applies to compromises approved of by the court on behalf of infants.

In *Stainton* v. *The Carron Iron Company*, J. (61), 645, Lord Justice Turner said:—"Where one of the parties has claims more or less extended against the other, the usual considerations which apply to cases of compromise, such as whether the parties understood their rights and questions of that nature, although perhaps they ought not wholly to be laid out of view,

cannot have the same decisive effect as might fairly be attributed to them in an ordinary case. The question in such a case is not so much what the parties knew of their rights as what they intended to do,—whether the compromise which they have made was meant by them to cover all the claims, or to which of them it was meant to apply." On appeal to the House of Lords the decree was affirmed. J. (64), 783.

In *Hanslip* v. *Kitton*, J. (62), 1113, Lord Chancellor Westbury stated that it was a universal rule of law that a release is limited entirely by the recitals which precede it.

In order that relief may be obtained on the ground of mistake, a restitutio in integrum must be possible. A change of condition may be fatal to the claim. This was held to be law by Lord Romilly in the *Bishop of Natal* v. *Gladstone*, 3 E. C. 53:— "A contract was entered into by three parties to it,—the Crown, the trustees of the fund on behalf of the contributors, and the plaintiff,—and although it is true that this court will occasionally refuse specifically to enforce a contract where one of the parties who entered into it did so by mistake, and while ignorant of the real state of the case, yet, where the contract has not only been entered into, but has also been acted upon, and where it is impossible to restore all the parties to it to the same position which they were in before the contract was made, the Court of Chancery never annuls the contract. Who can now restore the plaintiff to his former condition in 1853? Assume that the contributors can truly say: We subscribed this fund to make the plaintiff a bishop, with coercive powers inherent in his own episcopal jurisdiction. We find that the plaintiff as bishop must have recourse to a court of law for that purpose, and we therefore annul the engagement. Could any court listen to such arguments, or could such a doctrine be admitted to annul the contract? All persons are bound to know the law. Ignorance of the law, according to the hackneyed but most necessary maxim in our jurisprudence, and indeed in every jurisprudence, excuses no one. The contributors must therefore be treated as knowing, or as being bound to know, that to enforce the decision of the bishop he must have recourse to a court of civil jurisdiction, and that the court so resorted to would sit in judgment upon and review the correctness of the decision to this

extent—that the court would ascertain whether the bishop had acted within the scope of his authority, and had proceeded in a manner consonant with the principles of justice, and the plaintiff might justly say to the contributors: "You cannot now recede from your engagement, because that is made manifest to you which from the first you must or ought to have been well acquainted with."

A most important class of cases involving a compromise are those of family arrangements or settlements.

Lord Chancellor Hardwicke, in *Stapilton* v. *Stapilton*, 1 Atk. 2, ruled that where an arrangement is for the purpose of saving the honour of a father and his family, and is a reasonable agreement, if it is possible for a Court of Equity to decree a performance of it, it ought to be done. In *Williams* v. *Williams*, 2 C. A. 304, the late Lord Justice Turner, a judge distinguished for his mastery of the practice of conveyancers, said:—"It has been strongly urged—that is, in argument—that cases of family arrangements extend no further than to arrangements for the settlement of doubtful or disputed rights." But this, I think, is a very short-sighted view of the cases as to family arrangements. They extend, as I apprehend, much further than is contended for on the part of the appellant, and apply, as I conceive, not merely to cases in which arrangements are made between members of a family for preservation of its peace, but to cases in which arrangements are made between them for the *preservation of its property*. The resettlement of family estates, upon an arrangement between the father and the eldest son on his attaining twenty-one, may well be considered as a branch of these cases, and certainly this court does not in such cases inquire into the *quantum* of consideration." But there ought to be a knowledge of the doubts. Dixon H. L., 4 H. L. 606.

The plaintiff must be consistent. His alternative reliefs must be based on the same state of facts giving rise to different conclusions of law. It would be inconsistent to ask for specific performance and in the alternative for relief on the ground of fraud.—*Cawley* v. *Poole*, 1 H. M. 50; Fry 484. But the doctrine savours too much of scholasticism and technicality and too little of natural equity. See also *Bagot* v. *Easton*, 7 Ch. Div. 1.

Though in commercial contracts where one party says he is unwilling to fulfil it the other may rescind, yet in a suit to enforce a purchase of real estate (leasehold) the court would not give judgment immediately for rescission and forfeiture of deposit but only a decree for specific performance against a defendant who admitted that he was unwilling to complete and did not appear at the trial.—*Stone* v. *Smith*, 35 Ch. Div. 188. Specific performance without a declaration of lien was refused against a defaulter in Taron's case, W. N. 1887.

Where acting under the terms of the contract defendants have rescinded, though specific performance may be no longer obtainable damages can be sued for. Under the circumstances of rescission the court refused to grant an injunction or receiver against trustees holding funds for the defendants who had rescinded.—*Burnay* v. *Ambaca Railway*, 7 T. L. R. 545. 1891, May 15.

Alternative prayer for rescission in suit for specific performance.

37. A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

Court may require party rescinding to do equity.

38. On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

Murray v. *Palmer*. Sudgen's V. & P. 214—216.

CHAPTER V.

OF THE CANCELLATION OF INSTRUMENTS.

"Two etymologies of the word Chancellor or Cancellarius have been offered. The first is that of Sir Edward Coke, who derives the word from the verb cancello, and makes the chan-

cellor an officer to cancel invalid grants of the king, by drawing cancelli or lattice like lines upon them. But an officer to draw the royal grants must exist before they could be cancelled, and the cancelling would be the exceptional duty of such an officer; and, again, the analogy of Latin etymology requires the word cancellator, not cancellarius. The second derives the word from cancelli, as signifying the open bars of a gate, and makes the cancellarius to be the officer or usher of such gate or chancel. From a passage in the works of Ammianus Marcellinus, f. 330, de advocatis, "Cumque intra cancellorum septa et agi cœperunt alicujus fortunæ," we may conclude that a portion of the tribunals was partitioned off with cancelli. In the time of Theodosius the cancellarius had become a law officer of some importance. Thus we read in the Codex Theodosianus, I. xii., "Nullus judicum ad provinciam sibi commissam secum ducere audeat cui domestici, vel cancellarii nomen imponat nec profectum ad se undecunque suscipiat, ne famæ notâ cum bonorum publicatione plectatur. Periculo enim primatum officii cancellarios sub fide gestorum electos judicibus applicari jubemus, ita ut post depositam administrationem per continuum triennium nec militam deserant et Provincialibus præsentiam sui exhibeant, quo volentibus sit accusandi eos facultas." From this passage we may infer that the cancellarius was the actuary or registrar, the person who committed to writing and kept the acta of the court. He may also have been the grapharius, or the person to reduce to form the pleadings of the litigants. Constantine, Novella x., et Leges Longobardorum, ii. 40. It is easy to see how the cancellarius, the courtkeeper of an autocratic emperor, penes quem legum dictandarum et rescriptorum ad preces supplicum jus erat, would be a high officer of state.—1 Gibbon, 353; Codex Theodosianus, X. i. viii. Comment. Marvil.

Thus much is clear that, before Justinian had codified the Roman Law, there was attached to the then courts of justice an officer called cancellarius, who acted as a registrar or an actuary, and made and kept the acts of the court. Since then we find the universities of learning presided over by chancellors and bishops, assisted in the administration of their dioceses by similar officers, and hence the books sometimes speak of the lord chancellor as the king's chancellor." Griffith's Institutes 2.

39. Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

When cancellation may be ordered.

If the instrument has been registered under the Indian Registration Act, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered, and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

A testator on his death bed said to his executrix that he had the bond of B, but when he died B should have it and that he should not be asked or troubled for it. His executrix was decreed to deliver it up.—*Wekett* v. *Raby*, 3 Bro. P. C. 16.

Section 35*a* refers only to voidable or terminable contracts. This section provides for all written instruments whether void or voidable.

A father after paying his son's debts took a bond for the amount from the son. On its being proved that he did this as a sort of check on his son's behaviour and not as a security to be enforced for his own benefit the executors were decreed to deliver it up to be cancelled.—*Flower* v. *Martin*, 2 My. & Cr. 459.

Inquiries before a Registrar as to the due execution of an instrument and his decision in its favour notwithstanding the alleged executor asserted its forgery do not preclude a suit under this section.—*Mohima* v. *Jugul*, I. L. R. 7 C. S. 736.

A settlement made in contemplation of marriage and delivered to but not executed by the husband or trustees was cancelled after a lapse of $3\frac{1}{2}$ years on the marriage not taking place.—*Bond* v. *Walford*, 32 Ch. Div. 238.

When a marine policy is liable to be completely avoided as for example if it had been obtained by misrepresentation delivery

up and cancellation may be ordered. On the other hand where it cannot be so avoided but there is a good legal defence to an action upon it, a decree for cancellation cannot be made.—*Thornton* v. *Knight*, 16 Sim. 509; *Brooking* v. *Mandslay*, 38 Ch. Div. 636. The same principle was applied to an annuity deed.—*Bromley* v. *Holland*, 7 Ves. 3 and by Cottenham, L. C. to avoid instrument in *Simpson* v. *Howden*, 3 My. & Cr. 97. In *Cooper* v. *Joel*, Campell, L. C., reversed the decision of Romilly, M. R., who had ordered an instrument to be delivered up though there was a good legal defence saying that the evidence might be lost and so the defence prove worthless. 1 D. F. & J. 240. Campbell, L. C. said that if the rule alleged by the plaintiffs existed hardly any dispute could arise upon a contract or indeed as to any other legal right which might not be made a question of equity. S. C. Lord Selborne in *Hoare* v. *Bremridge*, said that the court has jurisdiction to set aside a contract where there has been concealment and misrepresentation. L. R. 8 Ch. Div. 22.

Where there is danger of the evidence for the defence being lost the remedy is not an action for cancellation but a suit to perpetuate testimony.—*Brooking* v. *Mandslay Son & Field*, 38 Ch. Div. 636. The law as to such suits is thus laid down. If it be possible that the matter in question can try the party plaintiff be made the subject of immediate judicial investigation no such suit is entertained. But if the plaintiff can by no means bring the matter into present judicial investigation (which may happen when his title is in remainder or when he is himself in possession) equity will entertain such a suit for otherwise the only testimony which could support the plaintiff's title might be lost by the deaths of his witnesses. Where he himself is in possession the adverse party might purposely delay his claim with a view to that event—*Angell* v. *Angell*, 1 S. & S. 83; *Earl Spencer* v. *Peek*, L. R. 3 Eq. 415.

Illustrations.

(*a.*) A, the owner of a ship, by fraudulently representing her to be sea-worthy, induces B, an underwriter, to insure her. B may obtain the cancellation of the policy.

(*b.*) A conveys land to B, who bequeaths it to C and dies. Thereupon D gets possession of the land and produces a forged instrument stating that the conveyance was made to B in trust

for him. C may obtain the cancellation of the forged instrument.

(*c.*) A, representing that the tenants on his land were all at will, sells it to B, and conveys it to him by an instrument dated the first January 1877. Soon after that day, A fraudulently grants to C a lease of part of the lands dated the 1st October 1876, and procures the lease to be registered under the Indian Registration Act. B may obtain the cancellation of this lease.

(*d.*) A agrees to sell and deliver a ship to B, to be paid for by B's acceptances or four bills of exchange, for sums amounting to Rs. 30,000, to be drawn by A on B. The bills are drawn and accepted, but the ship is not delivered, according to the agreement. A sues B on one of the bills. B may obtain the cancellation of all the bills.

40. Where an instrument is evidence of different rights or different obligations, the Court may, in a proper case, cancel it in part and allow it to stand for the residue.

What instrument may be partially cancelled.

A person who has divested herself by deed of all interest in property cannot because she may be liable on the covenants in the deed for damages bring a suit for cancellation of a previous conveyance on the ground of its being forged.

It is not competent for a plaintiff to combine in one plaint an allegation that she did not execute a sale deed and that if she did she had not received the consideration. On default of payment the plaintiff's remedy is not to have the deed delivered up to be cancelled but to have the money paid.—*Iyappa* v. *Ramalakshmamma*, I. L. R. 13 M. S. 549.

A contract to cultivate indigo in different villages in some of which cultivation had become impossible, but not through the fault of the plaintiff may be cancelled in part.—*Inder* v. *Campbell*, I. L. R. 7 C. S. 474.

Illustration.

A draws a bill on B, who endorses it to C, by whom it appears to be endorsed to D, who endorses it to E. C's endorse-

ment is forged. C is entitled to have such endorsement cancelled, leaving the bill to stand in other respects.

41. On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

Power to require party for whom instrument is cancelled to make compensation.

CHAPTER VI.

OF DECLARATORY DECREES.

"A decree means a formal expression of opinion upon a right claimed" no less than such opinion upon a defence. Griffiths' Civil Procedure, p. 2. Declaratory decrees are sought as to documents, adoptions, reversioners title, boundaries, registration lien or attachments and rents.

42. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Discretion of Court as to declarations of status or right.

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Bar to such declaration.

Explanation.—A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

"*Legal character.*" In respect of capacity for rights a person may be either physical or juridical. A single human is a physical person. By the term juridical person is meant every one other than a human being which is regarded by the law as a

subject of rights for example a trading or other corporation, public or private, civil or ecclesiastical.

A human beings capacity for rights consists in his or her having those qualities which are necessary in order to hold or acquire rights. This capacity for rights may be divided into natural and civil. To constitute a natural capacity for rights it is necessary not only that the being be born of a woman but that he be born with a human form; a monster is incapable of having rights, but a being defectively shaped as to form (portentum) possesses the legal capacity. The fœtus in the mother's womb is regarded as a human being. And all those rights which he would have had or acquired if he had been born at the time of their accruing are retained for him until the time of his birth. But in order that he may actually acquire them it is requisite that he be born as a man or woman alive and capable of living. The civil capacity for rights is usually spoken of as status sometimes as caput. Status is either public or private—public in respect of allegiance to and protection by the government—private in respect of personal, commercial and family rights. It varies with the sex, age or health of the individual. The relative rights of men and women are at present undergoing many changes both in England and India. Independently of the Penal Code, ss. 82 & 83, infancy or minority and majority or full age greatly influence rights by considerately subjecting minors to the control of their parents and guardians. See Griffith's Indian Trusts Acts, p. 92, Court of Wards.

Health of body and mind is one of the greatest blessings that Providence vouchsafes to human beings, who alas too often lose it through their own fault or the fault of their parents. As regards the mind, persons are either such has have the full use of their reason or such as have not. These latter according to the kind and several degrees of their mental disease are either raging mad or suffering from other kinds of derangement as lunatics who labour under an unnatural exaltation and the insane who labour under an unnatural depression of mind. Silliness or stupidity may either accompany mental disease or apart therefrom indicate uneducated faculties. Some individuals are incurable idiots from the time of their birth.

The rights of status also vary with consanguinity or blood relationship and affinity or relationship by marriage. Illegitimate kindred are viewed with far much less favour than legitimate both by the law and religious society.

Rights of status in the cases of soldiers, merchants, ambassadors and wives depend more or less upon the permanent residence of the parties upon their presence or absence.

Absence is either voluntary or compulsory. It may be voluntary where the party has another domicile, compulsory where the party is in prison or insane. It may be praiseworthy, blameless or dishonourable.

Class and profession and religion especially in India modify the general and common rights of all individuals.

Under the Indian Code of Procedure, 1859, s. 15 and the English Act, 15 & 16 Vict. c. 86, declaratory decrees stood upon the same footing and were not made unless there was a right to consequential relief which if asked for might have been given by the court or unless in certain cases a declaration of right was required as a step to relief in some other court.—*Cox* v. *Barker*, 3 Ch. Div. 359 ; *K. Natchear* v. *D. Tever*, L. R. 2, Ind. Ap. 169. A right to come to the court to have a document or Act (*e.g.*, a claim under a nuncupative will) which obstructed the title or enjoyment of property cancelled or set aside or for an injunction against such obstructions was sufficient to sustain a declaratory decree.—*S. S. Rai* v. *M. Dakho*, 5 Ind. Ap. 87.

In a suit by an adopted son against his father for declaration of right with consequential relief in a share of certain estate the defendant pleaded that he was absolute owner thereof and in regard to two of the talooks entered in the talookdar's list prepared under Act I of 1859. It appeared that under a number of family transactions the property in suit had been given to the defendant for such interest and with such right of succession to the plaintiff as by virtue of the Mitakshara attaches to ancestral immoveable property between father and son. *Held*, that the plaintiff was entitled to a declaration to that effect.—*S. Jaidial* v. *S. S. Ram*, 8 Ind. App. 215. T. Koer & T. Koer, is the first case reported in the Indian Appeals under the present section. One widow by her acts and declarations constituted herself a trustee for carrying out her husband's will. *Held*, that

another widow of the same husband was entitled to a declaratory decree. In another suit by a plaintiff entitled under the said will in remainder after the determination of the life estates of the said widows for a declaration of the invalidity of a transfer by the first widow. *Held*, that the suit was maintainable although declaratory relief might have been refused to him as a remote remainderman in a second declaratory suit. 9 Ind. Ap. 41.

The plaintiff must produce evidence not only that they have some rights in respect of the property in question. They must give definite proof of the claim alleged. Decree of the High Court reversed and that of the subordinate Judge affirmed Privy Council.—*Maina* v. *Brymohun*, I. L. R. 12 A. S. 587. See Griffith's Indian Evidence Acts, ch. vii.

On the same principle proceeded Bills *quia timet* bills of peace, bills to perpetuate evidence bills *de bene esse*. 44 on receivers.

By a bill of peace we are to understand a bill brought by a person to establish and perpetuate a right which he claims and which from its nature may be controverted by different persons at different times and by different actions or where separate attempts have already been unsucessfully made to overthrow the same right and justice requires that the party should be quieted in the right if it should be sufficiently established under the direction of the court. The obvious design of such a bill is to procure repose from perpetual litigation and therefore it is justly called a bill of peace. The obvious ground of the jurisdiction in cases of this sort is to suppress useless litigation and to prevent multiplicity of suits, by a single action.

Thus where a party has possession and claims a right of fishery for a considerable distance on a river and the riparian proprietors set up several adverse rights he may claim a bill of peace against all of them to establish his right and quiet his possession. Akin to bills of peace are actions to settle a confusion of boundaries but these latter require a superinduced equity. And in cases of mines and collieries courts of equity will entertain actions in the nature of those *quia timet* and bills of peace where there is danger that the mine may be ruined in the meantime before the right can be established. Story, ch. xxii.

Actions may be brought to preserve and perpetuate testimony when it is in danger of being lost before the matter to which it relates can be made the subject of judicial investigation. The jurisdiction is sometimes decried because it leads to a trial on written depositions which is deemed by some to be much less favourable to the cause of truth than the *vivâ voce* examination of witnesses. But what is still more important inasmuch as these depositions cannot be used till after the death of the witnesses and are not indeed published until after their death it follows that whatever may be the perjury committed in those depositions it must necessarily go unpunished. This testimony therefore necessarily has the infirmity that it is not given under the sanctions of those penalties which the Penal Code imposes upon persons giving false evidence. For these reasons courts are reluctant to entertain actions to perpetuate evidence unless where it is absolutely necessary to prevent a failure of justice.

The courts will not perpetuate testimony in respect of a right which may be immediately barred by the defendant. But if the interest be a present vested one not liable to such an objection it is perfectly immaterial how minute that interest may be or how distant its coming into actual possession and enjoyment may be. A present interest the enjoyment of which may depend upon the most remote and improbable contingency is nevertheless a present estate although with reference to chances it may be worth little. But a mere expectancy as that of an heir presumptive is not an estate or interest in order to maintain a *quia timet actio* to restrain an apprehended injury the plaintiff must prove imminent danger of a substantial kind or that the apprehended danger if it does come will be irreparable.—*Fletcher* v. *Bealey*, Pearson, J. 28 Ch. Div. 688 ; *Earl of Ripon* v. *Hobart*, 3 My. & K. 169 ; *A. G.* v. *Corporation of Kingston*, 13 W. R. 888 ; *Salvin* v. *North Branpeth Coal Com.*, L. R. 9 Ch. Div. 705.

December A. D. 1878, H a Hindu widow in possession by way of maintenance of an estate of which R owned one-third and P B and S one-third jointly made a gift thereof to N. H died January 1879. R & P, B and S joined in suing N for a declaration of their proprietary right to two-thirds of the estate and to have the deed of gift set aside. The court trying the suit treated it as one for a mere declaration of right and dismissed it on the ground that the plaintiffs had omitted to sue

for possession. November 1879. R & P, B and S again joined in suing N this time claiming possession of their two-thirds and to have the deed of gift set aside. *Held*, that the decision in the first suit was not a res judicata and a bar of the objects of the second suit.—*Ram* v. *Nakched*, I. L. R. 4 A. S. 261.

Subsequent to a decree for partition of an ancestral estate the creditors of one of the parties obtained a decree against their debtor. *Held*, that they could not obtain a declaratory decree that the partition decree so far as it affected the plaintiff's interests was fraudulent and colorless.—*Ram* v. *Rukmin*, I. L. R. 7 A. S. 884.

See *Bai* v. *Mulchand*, I. L. R. 9 B. S. 355.

A Muhammadan having no interest in certain property brought a suit for declaration that it was wuqf. *Held*, not maintainable under this section though possibly it might have been under s. 539 of the Civil Procedure Code, see Griffith's edition.—*Wajid* v. *Dranat-Ullah*, I. L. R. 8 A. S. 31.

Where a widow's possession is only by consent of the plaintiff's entitling her merely to receive the profits for her maintenance before seeking to obtain a declaratory decree the plaintiff should bring ejectment. Where a deed mortgages only a widow's share she is not entitled to a declaration.—*Bholai* v. *Kali*, I. L. R. 8 A. S. 70.

It cannot be said that under no circumstances can a daughter's son maintain a declaratory suit during the lifetime of his mother or maternal aunt in respect of his maternal grandfather's property to the full ownership of which he has a reversionary right.—*Sant* v. *Deo*, I. L. R. 8 A. S. 365.

An improper or irregular exercise of the discretionary power does not in itself constitute sufficient ground for the reversal of a decree which is not open to objection in respect of jurisdiction or the merits of the case and is so covered by s. 578 of the Civil Procedure Code by Griffith.—*Muhammad* v. *Khudu*, I. L. R. 9 A. S. 622. See also *Sant* v. *Deo*, I. L. R. 8 A. S. 365.

A vendor who has given a covenant for title has no right under this section against a mortgage alleged to be fraudulent which has been merged in the decree where the mortgage deed

of the public who formally claims to use such lands as a public road and who thereby has endangered the title of the owner. To such a suit it is unnecessary to make the Secretary of State a party. Such an order is not barred under s. 137 of the Criminal Procedure Code. I. L. R. 14 C. S., 60 overruled.—*Chuni* v. *Ram*, I. L. R. 15 C. S. 460.

An owner of land may bring the suit against any one of the public who formally claims to use such road as a public road and has thereby endangered the title of the owner. The Secretary of State is not a necessary party. The suit is not barred by an order under s. 137 of the Criminal Procedure Code, see Griffith's edition.—*Chuni* v. *Ram*, I. L. R. 15 C. S. 460; *Khodabuksh* v. *Mouglai*, 14 C. S. 60 overruled. S. C.

August 1878, M pledged his ship to C as security for a bond debt of 1,500 Rs. repayable by two instalments in February and August 1879. December 1878, S seized the ship and sold it in French territory. C immediately made a claim on the proceeds. The French court required him to produce a copy of an English court's judgment acknowledging and sanctioning C's claim against M. C sued S to obtain a declaration of his right to recover the amount due to M on his bond. *Held*, that whether or not his lien was destroyed by the sale of the ship in French territory, C was not entitled to any of the proceeds of the sale either at the date of the sale or of his claim in the French court and the denial by S of C's right gave C no cause of action.—*Chitambara* v. *Muthaya*, I. L. R. 5 M. S. 330.

A joint Hindu family consisting of three brothers enjoyed an undivided one-third share of certain lands. One member sued the others for partition of the family property claiming to have his right declared to receive one-third of the share of the family's profits from the lands. *Held*, that the court was not debarred by the provisions of s. 42 from granting the relief.—*Panchanadayyan* v. *Nailkandayyan*, I. L. R. 7 M. S. 191.

By an agreement between S and M members of the same Hindu family it was arranged that certain immoveable property dedicated to charitable uses by the family should be managed by M subject to the supervision of S and that M should render accounts to S and observe certain conditions. S sued M in the court of the District Munsif and prayed for M's removal from

and his own appointment to the office of manager. The property exceeded the limits pecuniarily of the jurisdiction. *Held*, that as S could not sue for M's removal from the office without praying for his ejectment from the property the suit was not maintainable.—*Sonachala* v. *Manika*, I. L. R. 8 M. S. 516. Where an actual suit from the office is not involved a declaratory suit will lie.—*Ramanuja* v. *Devanayaka*, I. L. R. 8 M. S. 361.

The plaintiff's uncle's sons of R a deceaseed Hindu brought a suit as reversioners of R for a declaration that certain alienations made by M the widow of R were not binding beyond the life of M. *Held*, that the suit would lie.—*Greeman* v. *Wahuri*, 8 C. S. 12 approved; *Gangayya* v. *Mahalakshmi*, I. L. R. 10 M. S. 90.

The plaintiff's uncle's sons of R a deceased Hindu brought a suit as reversioners of R for a declaration that alienations made by M the widow of R were not binding beyond her lifetime. *Held*, notwithstanding, I. L. R. 8 Cal. 12, that the suit was maintainable.—*Gangayya* v. *Mahalakshmi*, I. L. R. 10 M. S. 90.

The restrictions must be held to refer to the consequential relief properly obtainable by the plaintiff as against the defendants in the suit and not to extend to the case of all third parties who may possibly support some of the contentions of the defendant's suit as the tenants of a small portion of land who had attorned to the defendants.—*Subramanyan* v. *Parmashwaran*, I. L. R. 11 M. S. 116.

The intervention of two life estates does not preclude the reversioner from obtaining a declaration of his interest in land. —*Kandasami* v. *Akkammal*, I. L. R. 13 M. S. 195.

Illustrations.

(*a.*) A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. A may sue for a declaration that they are not entitled to the right so claimed.

(*b.*) A bequeaths his property to B, C and D, 'to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children.' No such children are in existence. In a suit against A's executor, the Court may declare whether B, C and D took the property

absolutely, or only for their lives, and it may also declare the interest of the children before their rights are vested.

(*c.*) A covenants that if he should at any time be entitled to property exceeding one lákh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The Court may make the declaration.

(*d.*) A alienates to B property in which A has merely a life-interest. The alienation is invalid as against C, who is entitled as reversioner. The Court may in a suit by C against A and B declare that C is so entitled.

(*e.*) The widow of a sonless Hindú alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her, may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime.

(*f.*) A Hindú widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.

(*g.*) A is in possession of certain property. B, alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property.

(*h.*) A bequeaths property to B for his life, with remainder to B's wife and her children, if any, by B, but if B die without any wife or children, to C. B has a putative wife, D, and children, but C denies that B and D were ever lawfully married. D and her children may, in B's lifetime, institute a suit against C and obtain therein a declaration that they are truly the wife and children of B.

Effect of declaration.

43. A declaration made under this chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in exist-

ence at the date of the declaration, such parties would be trustees.

Illustration.

A, a Hindú, in a suit to which B, his alleged wife, and her mother are defendants, seeks a declaration that his marriage was duly solemnized and an order for the restitution of his conjugal rights. The Court makes the declaration and order. C, claiming that B is his wife, then sues A for the recovery of B. The declaration made in the former suit is not binding upon C.

CHAPTER VII.

OF THE APPOINTMENT OF RECEIVERS.

Appointment of receivers discretionary.

44. The appointment of a Receiver pending a suit is a matter resting in the discretion of the Court.

Reference to Code of Civil Procedure.

The mode and effect of his appointment, and his rights, powers, duties and liabilities, are regulated by the Code of Civil Procedure.

A receiver appointed pending a suit represents all the parties interested, but one appointed in the case of an insolvent judgment-debtor is the agent of the creditors and not also of one claiming adversely to them as a mortgagee. E. P. Warren, L. R. 10 Ch. Div. 222. Griffith's INDIAN INSOLVENCY, p. 175.

The court cannot undertake the management of a going concern but it may appoint an interim receiver for a limited purpose that does not displace the management and may so leave it eventually to continue.—*Const* v. *Harris*, T. & R. 517; *Hall* v. *Hall*, 3 M. & G. 79. Ordinarily on the death of one of two partners the other is entitled to the management for the purpose of winding up and he may even be appointed receiver.—*Philips* v. *Atkinson*, 2 Br. C. C. 272. See Griffith's Institutes of Equity, pp. 123—128. The liability and rights of sureties for receivers do not differ in principle from those of other sureties but they cannot claim to be discharged at their own request except

perhaps under special circumstances.—*Griffith* v. *Griffith*, 2 Ves. Jr. 400.

As to the powers of certain courts to appoint receivers as to a receiver's liabilities and the appointment of a collector. See Griffith's Civil Procedure Code, pp. 170—171, Ch. XXXVI, ss. 503—505.

Section 503 is as follows: "Whenever it appears to the court to be necessary for the realization, preservation or better custody or management of any property moveable or immoveable the subject of a suit or under attachment the court may by order—(a) appoint a receiver of such property and if need be remove the person in whose possession or custody the property may be from the possession or custody thereof (c) commit the same to the custody or management of such receiver, and (d) grant to such receiver such commission on the rents and profits of the property by way of remuneration as the court thinks fit and all such powers as to bringing and defending suits and for the realization, management and protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits and the execution of instruments in writing as the owner himself or such of those powers as the court thinks fit."

"Every receiver so appointed shall (e) give such security (if any) as the court thinks fit duly to account for what he shall receive in respect of the property; (f) pass his accounts at such periods in such form as the court directs; (g) pay the balance due from him thereon as the court directs and (h) be responsible for any loss occasioned to the property by his wilful default or gross negligence. Nothing in this section authorises the court to remove from the possession or custody of property under attachment any person whom the parties to the suit or some or one of them have or has not a present right to remove."

The Indian cases decided on the sections are collected in Mr. Griffith's Commentaries, pp. 170—171. The modern English cases are collected at p. 374 of the same work.

Not only does justice redress wrongs when committed by damages or specific performance it sometimes by way of precaution prevents anticipated mischiefs. The party seeks the aid

of the court because he fears some future probable injury to his rights or interests. The manner in which this aid is given depends upon circumstances. The courts sometimes interfere by the appointment of a receiver to receive rents or other income, sometimes by an order to pay a pecuniary fund into court, sometimes by directing security to be given or money to be paid over and sometimes by the mere issuing of an injunction or other remedial process thus adapting their relief to the precise nature of the particular case.

In regard to trust property the jurisdiction is equally applicable to cases where there is a present right of enjoyment and to cases where the right of enjoyment is future or contingent. The object in all such cases is to secure the preservation of the property to its appropriate uses and ends and wherever there is danger of its being converted to other purposes or diminished or lost by gross negligence the interference of a court becomes indispensable. Thus if property in the hands of a trustee for certain specific uses or trusts express or implied—See Griffith's Indian Trusts Acts, p. 103, 231—is in danger of being diverted or squandered to the injury of any claimant having a present or future title thereto the administration will be undertaken by the court.

Executors and administrators are treated as trustees of the assets of the deceased party. If there is danger of waste of the estate or collusion between them and the debtors whereby the assets may be subtracted the court will interfere and secure the fund and in case of collusion will order the debtors to pay the amount of their debts into court.

So in property which is not trust but is future contingent or a remainder in respect of the enjoyment, protection may be obtained if the party in possession is acting wrongfully.

The purchaser of a coal mine sued to rescind the contract on the ground of fraud but it was essential to its existence that the mine should be kept in a going state and the purchaser was in possession, on the application of the purchaser a receiver and manager was appointed pending the suit the costs thereof to abide the result.—*Gibbs* v. *David*, L. R. 20 Eq. 373.

Where extensive karvaad estates in Malabar are under the management of a karnaven or where a member of a Hindu

family is to be regarded as agent or manager for the others and he is misapplying and wasting the property, a proper case may be made out for the appointment of a receiver. In the absence of fraud or acts of malicious and destructive waste the court will not generally interfere at the instance of a person alleging a mere legal title in himself against one in possession.—*Talbot* v. *Hope Scott*, 4 K. & J. 96; *Carrow* v. *Farrior*, L. R. 3 Ch. Div. 728.

Two trustees of personal property disagreeing with a third and acting alone a receiver was appointed at the instance of a beneficiary.—*Swale* v. *Swale*, 22 Bea. 584. Misconduct, waste or improper disposition of the trust property by the trustees or apart and incapacity of the other part to prevent it. Actual danger from bad character, drunken habits or great poverty but not mere insolvency are several grounds for appointing a receiver.—*Everett* v. *Prythergch*, 12 Sim. 367; I. R. Johnson, L. R. 1 Ch. Div. 325, 12 Ves. 4, 1 Mad. 46. A plaintiff insured in a society brought an action on behalf of himself and other insurers charging a loss of funds through the negligence of the directors and the dishonesty of the secretary. H obtained the appointment of a receiver and an injunction against parting with the assets or collecting them.—*Evans* v. *Coventry*, 9 D. M. & G. 511.

An injunction may be obtained against one partner who misconducts himself but a partnership receiver will not be appointed unless there is an entire dissolution of the partnership or there be facts which if proved at the hearing would entitle to a decree for a dissolution. Lindley 1017; *Chapman* v. *Beach*, 1 J. & W. 594. Actual dissolution is not necessary. Exclusion of one or more partners by another or anothers is sufficient.—*Wilson* v. *Greenwood*, 1 Swan. 481; *Harding* v *Glover*, 18 Ves. 281.

A few words upon the general rights of a receiver and their incidents may be useful. By the appointment of a receiver of rents and profits the court becomes virtually the landlord. Should they belong to an infant the receiver's possession is that of the infant. But where the rights of different parties to the action are adverse his possession is that of the party who ultimately prevails. He can take no serious legal step without the authority of the court. Should a stranger claim an adverse interest he should apply to the court by motion before commencing an action. A receiver may be appointed of property subject to the rightful lien of another person. And if in the nature of

an equitable execution the receivership will if in time prevail against the claim of an official liquidator, the more especially if the liquidation be in a foreign country.—*Société des mataux* v. *Mason & Barry*, C. A., April 15, 1891. But see and consider the French Code de commerce, s. 446 "nantissement."

Mere poverty of the party will not of itself constitute a sufficient ground but there must be other ingredients to justify the appointment.

So where there are several incumbrancers on an estate as the first incumbrancer is entitled to the possession of an estate and the receipt of the rents and profits, the court will not deprive him of such possession of the rents and profits except upon sufficient ground. But if the first incumbrancer is not in possession or does not desire it, or if he is paid off or if he refuses to receive what is due to him there a receiver may be appointed upon the application of a subsequent incumbrancer. But the court is cautious not to disturb prior rights or equities and therefore before it acts finally it will endeavour to ascertain the priorities and equities of all the incumbrancers and then it will apply the funds which are received according to such priorities and equities in case the incumbrancers entitled thereto make a seasonable application for the purpose.

The English courts do not interfere with executors and administrators on slight grounds. Whenever therefore the appointment of a receiver is sought against them it is necessary to establish by suitable proofs that there is some positive loss or danger of loss of the funds; as for instance, some waste or misapplication of the funds or some apprehended danger from the insolvency or personal fraud, misconduct or negligence of the executor or administrator.

There is no limit to the power of the court to appoint a receiver except only the requisite of its being just and convenient. —*Pease* v. *Fletcher*, 1 Ch. Div. 273. In an action for partition where one of the co-owner's is in occupation though not exclusive of the property the court has appointed a receiver until the hearing.—*Porter* v. *Lopez*, 7 Ch. Div. 358. In an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels before the appearance of the defendant there being an immediate danger of the chattels being disposed

of.—*Taylor* v *Eckersley*, 2 Ch. Div. 302. Where in an administration action the defendant the sole surviving executor and trustee had been condemned to pay the costs in an action to test the validity of the will and an execution had been issued against him and there had been a return of "no goods on application of the present plaintiffs who were executors of a deceased executor and creditor of the testator and also a residuary legatee a receiver of the proceeds of sale of part of the testator's realty and of the rents of the other part and of the outstanding personal estate was granted."—*Gaidthorpe* v. *Gaidthorpe*, W. N. 1878, 91. In a creditor's administration suit the plaintiff should immediately apply for a receiver to prevent the executor or administrator paying creditors in full. I. R. Radcliffe, 7 Ch. Div. 733. In an action for specific performance of a lease of a farm a decree was made for the defendant. The plaintiff having appealed was appointed receiver without giving security upon his undertaking to abide by any order which the court might make.—*Hyde* v. *Warden*, 1 Ex. D. 309. A receiver was appointed at the instance of a plaintiff who had recovered judgment against a debtor whose only interest in land was an equity of redemption.—*Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 275. A receiver for a married woman entitled for life for her separate use to dividends upon stock was similarly appointed.—*Bryant* v. *Bull*, 10 Ch. Div. 153. A receiver was appointed at the instance of a mortgagee for both legal and equitable property.—*Pease* v. *Fletcher*, 1 Ch. Div. 273. In an action for ejectment where the defence was that the plaintiff was only a sub-mortgagee.—*Real and Personal Advance Co.* v. *McCarthy*, 40 L. T. 878. Where a legal mortgagee of business premises as an hotel was prevented by the mortgagor from taking possession.—*Truman & Co.* v. *Redgrave*, 18 Ch. Div. 547. In the case of a bankrupt administrator. I. R. Hopkins, 19 Ch. Div. 61.

Who may be receiver? The plaintiff in cases of emergency.—*Taylor* v. *Eckersley*, 2 Ch. Div. 302, and under special circumstances.—*Hyde* v. *Warden*, 1 Ex. D. 309; but not the plaintiff's solicitor. I. R. Lloyd, 12 Ch. Div. 447 one of the members of a dissolved partnership in certain cases.—*Sargant* v. *Read*, 1 Ch. Div. 600; the manager of a mining company in a suit by the debenture holders for foreclosure.—*Peek* v. *Trinsmaran Iron Co.*, 2 Ch. Div. 115. But not the secretary of a land and building

society in a suit by the Depositors. Conservative Building Society, A. D. 1891—3. An unpaid vendor of a company in voluntary liquidation and unable from insolvency to carry on the work.—*Boyle* v. *Betters Colliery*, 2 Ch. Div. 726. A plaintiff was appointed an interim receiver upon an ex parte motion before appearance of the defendant without security for 14 days or until a receiver should be appointed on reference to chambers. He undertook to deal with the property only under direction of court and to abide by any order as to damages or otherwise.—*Taylor* v. *Eckersley*, 2 Ch. Div. 302.

In England a receiver may be appointed by order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made; and such order may be made either unconditionally or upon such terms and conditions as the court shall think just; and whether the estates claimed by both or by either of the parties are legal or equitable. Judicature Act, 1873, s. 23.

A receivership order ascertains at the date when it is made the rights of the parties obtaining it. Should the property be in the hands of another party who has a lien upon it execution may be postponed thereby but the right to execution is still ascertained.—*Levajseur* v. *Mason & Barry*, April 15, 1891, C. A.

An order in an action by judgment-creditors appointing one of their number, without security, receiver of the stock in trade does not make them secured creditors against the official assignee in insolvency. It is not an equitable execution. I. R. Dickinson, C. A. 22 Q. B. D. 187.

An execution proved in a creditor's action for £115 due to him by his testator. He had handed over to the receiver on his appointment assets exceeding £115 and afterwards paid a creditor £700 for which he was surety with interest. *Held*, that the executor had priority as to £115 as he might have retained the same but could only stand in a creditor's place as to £700 without interest because when that became due the right of retainer had ceased. I. R. Harrison, 32 Ch. Div. 395, following I. R. Jones, 31 Ch. Div. 440.

Where land is liable to be taken in execution the appointment of a receiver is equivalent to a completed execution and delivery of land. I. R. Pope, 17 Q. B. D. 743. But where land has been

actually taken in execution in a creditor's suit his title is not displaced by the subsequent appointment of a receiver. I. R. Hobson, 33 Ch. Div. 493.

An order appointing a receiver of an Indian officer's pension is bad. Army Act, 1881, s. 141.—*Lucas* v. *Harris*, 18 Q. B. D. 127.

Under the present practice a mortgagee in possession is entitled to the appointment of a receiver notwithstanding he has been paid all his interest and costs out of rents received by him while in possession and that he has surplus rents in his hands.—*Mason* v. *Westoby*, 32 Ch. Div. 206; cf. *Sollory* v. *Leaver*, L. R. 9 Eq. 22.

After judgment for foreclosure absolute the action being at an end the plaintiff cannot obtain an order for a receiver even though the conveyance of the property to the plaintiff remains to be settled.—*Wills* v. *Luff*, 38 Ch. Div. 197.

Mortgagor in possession held liable to pay an occupation rent from date of demand by receiver only and not from date of receiver's appointment.—*Yorkshire Banking Co.* v. *Mullan*, 35 Ch. Div. 125.

When the court has appointed a receiver of a partnership business during an action it is an interference with him for a partner's son to send circulars soliciting customers of the firm.—*Helmore* v. *Smith*, 35 Ch. Div. 449.

The remuneration of a receiver and manager appointed by partners to wind up their business is to be quantum meriut and is not governed by any scale.—*Prior* v. *Bagster*, W. N. (1887), 194.

It is the duty of a receiver and manager appointed until sale to carry on the business so as to protect the assets not to impose onerous liabilities on the firm by undue speculation.—*Taylor* v. *Neate*, 39 Ch. Div. 538.

A receiver may be appointed for the purpose of enforcing an order for payment of money into court. I. R. Whiteley, W. N. (1887), 137.

An order obtained by judgment-creditors appointing a receiver to deceased debtor's chattels and business was set aside on the application of the debtor's executor the court being of opinion

that the circumstances of the case did not justify the appointment.—*Manchester Banking Co.* v. *Parkinson*, 22 Q. B. D. 173.

The court does not interfere with an executor's right of retainer by appointing a receiver at the instance of the plaintiff in a creditor's administration action merely because the executor will probably exercise his right to the prejudice of the general body of creditors nor unless it is shown that the assets are being wasted. I. R. Wells, 45 Ch. Div. 569.

A receiver and manager of a business was appointed with a direction to collect the assets and pay the debts. *Held*, that this did not give a creditor of the business after the testator's death who was not a party to the administration suit the right to come to the court for an order that the receiver should pay his debt even though the amount of the debt was ascertained and undisputed.—*Blundell* v. *Blundell*, W. N. (1886), 125.

Where there are several incumbrancers of an estate the first is entitled to possession of the estate and to the receipt of the rents and profits of which the court will not deprive him without sufficient cause.—*Rowe* v. *Wood*, 2 Jac. & Walk. 554. His title to possession disentitles him in ordinary cases to a receiver seeing that he can help himself without one.—*Sollory* v. *Leaver*, L. R. 9 Eq. 22.

After an order had been made for the administration of the real and personal estate of a testatrix her sole executor and trustee became insolvent. The court of appeal held that a receiver ought to be appointed and that the fact that the assignee was not before the court was not a sufficient reason for refusing one. I. R. Johnson, L. R. 1 Ch. Div. 325.

The Judicature Act, 1873, s. 25, § 8, enables a court in England to appoint by interlocutory order a receiver in all cases in which it shall appear to the court to be just or convenient that such order should be made and to make the order conditionally or upon terms and conditions thought to be just by the court. In a suit for money lent the plaintiff had obtained judgment against the defendant's husband and wife. Upon his application ex parte he was appointed without giving security receiver of the income of the wife's reversionary interest under a will.—*Fuggle* v. *Bland & Wife*, 11 Q. B. D. 711.

Partnership property consisted of mines, plant and slaves in

Brazil put into shares and sold in England in the form of scrip, transferable by delivery. The defendant and another at a meeting of shareholders had been appointed sole directors and trustees of the property. The associate had died and disputes had arisen. It was that an owner of shares purchased in the market might maintain a bill against the defendant as sole surviving trustee for an account of the receipts and payments of the debts of the association and the division of the profits. The defendant left England after the filing of the bill and pending a motion for a receiver. *Held*, that the plaintiff had an equity to have the property secured by the appointment of a receiver. *Sheppard* v. *Oxenford*, 1 Kay & J. 491.

A person who is prejudiced by the conduct of a receiver appointed in a suit by way of equitable execution ought not without leave of the court to commence a fresh suit to restrain the proceedings of the receiver even though the act complained of was beyond the scope of the receiver's authority but ought to make an application for such relief as he is entitled to in the action by which the receiver was appointed.—*C. A. Searle* v. *Choat*, 25 Ch. Div. 723.

A receiver may prove against a debtor's estate in insolvency though the effect be to discharge the debtor and entitle him to a legacy which otherwise might have been applied to the debt. —*Armstrong* v. *Armstrong*, L. R. 12 Eq. 614.

In an action to foreclose the mortgage of a public house the mortgagee may obtain an order for a receiver and manager but not until judgment an order that the mortgagor should give up possession.—*Truman Hanbury & Co.*, 18 Ch. Div. 547, W. N. (1890), 121.

A receiver appointed in an action is not in a position to present an insolvency petition against the debtor in respect of a sum of money the debtor has omitted to pay him under order of the court because there is no debt due to the receiver. I. R. Sacker, C. A. 22 Q. B. D. 179. Griffith's INDIAN INSOLVENCY, p. 43.

A mortgagee who has once taken possession of the mortgaged property cannot relinquish possession at his pleasures. As a general rule the court will not relieve him from the responsibilities which he has so assumed and appoint a receiver.

A legal mortgagee has no absolute right to a receiver.—*Mason* v. *Westoby*, 32 Ch. Div. 206 considered. I. R. Prythergch, 42 Ch. Div. 590.

There is no power in one partner in the absence of special power from his co-partner or evidence of a special course of dealing to accept shares in a company even though fully paid up in satisfaction of a debt due to the firm. Nor has the court jurisdiction in the winding up of the partnership to confer on a receiver greater powers in this respect than a partner would have had. L. R. 8 Ch. Div. 831, Weikersheim's case explained.—*Niemann* v. *Niemann*, 43 Ch. Div. 198.

S being entitled to an entire property subject to a mortgage a judgment-debtor shortly before the death of S applied for a receiver by way of equitable execution. The motion was adjourned and in the meantime S died. *Held*, that after the death of S and in the absence of a party to represent his estate a receiver could not be appointed.—*Atkins* v. *Shephard*, 43 Ch. Div. 131.

What is commonly called equitable execution is not in fact execution but equitable relief granted because there is some hindrance to the ordinary process of execution. It is therefore subject to the equitable rule that all parties interested should be before the court. S. C. & Griffith's Institutes of Equity, p. 222.

As a general rule the liquidator should be appointed receiver for the debenture holders. But if they have already appointed a receiver under special powers given them by their security the court will not displace him by the liquidator. Joshua Stubbs, Limited, 1891, 1 Ch. Div. 187. See Griffith's Indian Companies Act.

The court on the application of the only debenture holder by consent appointed the managing director receiver and also manager of the business pending realization, and settled the terms as to wages, current expenses, accounts and immediate realization.—*Makins* v. *Perey Ibbotson & Sons*, 1891, 1 Ch. Div. 133.

The court will appoint a receiver to protect the debenture holder's security if it be in jeopardy owing to the company's insolvency although the principal is not immediately payable nor the interest in arrears.—*McMahon* v. *North Kent Ironworks*, 1891, W. N. 38; *Bissil* v. *Bradford Tramways & Co.*, 1891, W. N. 51.

CHAPTER VIII.

OF THE ENFORCEMENT OF PUBLIC DUTIES.

The right to issue the prerogative writ of mandamus for which orders under this chapter are substituted was part of the original civil jurisdiction of the presidency high courts. The high court of Allahabad and the chief court of the Punjab not possessing such jurisdiction the chapter does not apply to them.

This chapter in the conditions of the order substituted for the writ of mandamus expresses "the results of an experience of centuries gained by superior courts in England working without statutory limits to their jurisdiction." They shew very clearly the proper limits of peremptory interference even when there has been an excess of jurisdiction or a failure to exercise it by the lower court. "It is very desirable that there should as far as possible be a complete agreement of principle between the working of the high court at its original and appellate sides in giving effect to kindred jurisdictions. The terms imposed on the one may well serve for guidance to the other branch of this court unless they contravene some law which the latter branch has to administer." Where the legislature intends the first stage of a judicial inquiry to be the last also; where it intends possible errors in such inquiry to be set right by an appeal, the supersession by the high court of the designated courts would be a usurpation by whatever motives it might be induced.—*Shiva* v. *Joma*, I. L. R. 7 B. S. 341.

Power to order public servants and others to do certain specific acts.

45. Any of the High Courts of Judicature at Fort William, Madras, and Bombay may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature: provided—

All prosecutors whose charges are dismissed by the Presidency Magistrates are affected by the order of discharge and are therefore entitled under s. 170 of the Presidency Magistrates

Act to obtain copies of the orders made by and of the depositions taken before the Magistrate. Such a right will be enforced under the present section. Em. I. L. R. 8 C. S. 166.

The granting of a prerogative writ of mandamus is discretionary and such writ will not be granted where there is another remedy equally convenient, beneficial and effectual open to the applicant at the time when it becomes necessary to resort to one or other of the remedies. Therefore the court refused the writ to enforce a transfer of shares in a company for which purpose the Companies Act had provided a special remedy.—*R.* v. *Lambourne Valley Railway Company*, 60 L. T. Rep. N. S. 54. Griffith's Indian Companies Act.

The courts can also enjoin the alleged performance of a public duty by a person acting as but not really being a public officer. The person professed to be a surveyor under the Public Health Act.—*Lewis* v. *Weston-super-mare Local Board*, 4 Ch. Div. 55.

In England mandamuses have been issued to municipal and other corporations to railway and other companies to poor law guardians to local boards to district and burial boards to sewer drainage and inclosure commissioners to churchwardens and vestries to road and river trustees to railway commissioners and other public bodies. They have also been issued to such high officers as Lord Lieutenants of counties to sheriffs, treasurers of a county or town surveyors, parish or district officers, gaolers, savings bank managers, directors and registration officers and very recently to a Master of the high court of Justice to compel him to tax the costs of a party entitled to them.—*Q.* v. *Manley Smith*, L. R. 12 Q. B. D. 481; *Pearson* v. *Great Northern Rail.*, L. R. 7 Q. B. 785 n; cf. *Armytage* v. *Wilkinson*, L. R. 3 App. Cas. 355; *Bell* v. *Master in Equity*, 2 App. Cas. 563.

(*a*) that an application for such order be made by some person whose property, franchise, or personal right, would be injured by the forbearing or doing (as the case may be) of the said specific act;

The National Debt Act, 1870, s. 51, provides for the transfer to the National Debt Commissioners of all stock no dividend

whereon is claimed for 10 years before the last day on which a dividend thereon becomes payable. Section 52 provides for the entry in a book of the particulars of the ownership and for the list being open at the usual hours of transfer for inspection. On argument of a rule for a mandamus to enable the servants of a company to inspect whose business it was to have information ready to give persons who wished to consult them with a view to making a claim to the stock. *Held*, that only persons directly interested in the stock could claim inspection and that mandamus should not be granted.—*Q.* v. *Bank of England*, 1891, April 9. A rational curiosity, or a desire to obtain information on a general subject to ascertain facts which may be useful in an ulterior proceeding is not a ground for an order to inspect public books. For use of them as evidence in a legal proceeding the order is usually granted. 6 A. & E. 99.

A demand should first be made by the party injured on the person or body bound to perform, and their refusal should be proved to the court. This, however, is not a rule of law but prudent advice.

"*In England*," a mandamus has never been granted to deprive of an office.—*Q.* v. *St. John's College*, 4 Mod. 233; Shortt 289, A. D. 1887. But it is open to argument whether the comprehensive words of this section do not confer upon the Indian High Courts such power at least indirectly if not directly. In England the remedy would be by *quo warranto*.

"*Franchise*." Thus may be enforced the election and the admission (with the performance of all requisite formalities) to various public offices of persons entitled to admission and the restoration to such offices or franchises of persons wrongfully removed therefrom. But a court will not order a restoration where it will be the duty of a corporation to remove the applicant again for a preceding neglect of duty.—*Q.* v. *Griffiths*, 5 B. & Ald. 736.

(*b*) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character;

The application ought not to be premature. E. P. Parkes,

9 Dowl. 614; nor be unreasonably delayed.—*R.* v. *Leeds Navigation*, 11 A. & E. 316.

"*Court.*" Where the duty is of a judicial character a mandamus is granted only where there is a refusal to perform it in any way; not when it is done in one way rather than another.—*Q.* v. *Lichfield*, 7 Mod. 218; *Q.* v. *London*, 24 Q. B. D. 213; *Lawson* v. *Labouchere*, 1879, Nov. 27. But a judicial discretion exercised unjustly or arbitrarily is ground for a mandamus.

The public duty must be an imperious one, that is, one as to which no liberty of choice as to the performance or non-performance of it is left with the officer or tribunal that has to discharge it.—*R.* v. *Fowey*, 2 B. & C. 591. But in public statutes, that is acts of a legislature words only directory, permissory or enabling may have a compulsory force where the thing to be done is for the benefit or in advancement of public justice." Cairns, C., L. R. 5 App. Cas. 225. Whether the word may is to signify must is to be solved from the context the particular provisions or from the general scope and object of the enactment conferring the power. *Id.* 235.

Conveyance of goods by a railway company established by the legislature is a public right. Davis, H. L. 1895, May 10.

(*c*) that, in the opinion of the High Court, such doing or forbearing is consonant to right and justice;

Right seems to refer to the individual, justice to the general system. The Latin word jus includes both the English ideas while justice includes intention. Griffith's Institutes 82, 2 c.

For instances where the prerogative writ of mandamus has been granted. See E. P. Lee, Ell. Bl. & Ell. 863; *Q.* v. *Southampton*. It has been granted to compel the admission or restoration of the applicant to an office or franchise of a public nature, spiritual or temporal, to academical degrees to the use of a temple, for the production, inspection or delivery of public books or papers; for the surrender of the property of a corporation, for the affixing of its seal and to compel the holding of a court.

A mandamus was granted to compel a municipal officer to pay

the costs of a prosecutor and his witnesses pursuant to the order of the criminal judge.—*R.* v. *Oswestry*, 12 Q. B. 239.

A discretion vested in an individual or body of persons may be called in question on the ground of malicious feelings indulged in by him or them towards the applicant or on the ground of some personal or private interests adverse to his.—*R.* v. *Darlington*, 12 L. J. Q. B. 128.

If the inferior court in which is vested a discretion of a judicial kind lays down and acts on arbitrary or unjust rules for the exercise of it the High Court may interfere.

(*d*) that the applicant has no other specific and adequate legal remedy ; and

The existence of a specific civil remedy was always an objection to the issue of a mandamus. I. R. Nathan, 12 Q. B. D. 161. —*Q.* v. *Registrar of Joint Stock Companies*, 20 Q. B. D. 430.

Where the applicant is legally entitled to a sum of money and has no other means of obtaining it a mandamus will be granted for the purpose.—*R.* v. *Longhorn*, 17 Q. B. 77.

A sexton claimed a mandamus to compel the executrix of the late sexton to deliver up the keys of the temple. The application was refused as the applicant could get new keys, the keys of a church not being like an emblem or muniment of office. Anon. 2 Chill. 255.

"*Adequate*," the order is not cumulative but substitutionary where harshness or other objection can reasonably be urged against the ordinary remedy.—*R.* v. *Windham*, 1 Cowp. 377.

(*e*) that the remedy given by the order applied for will be complete.

An impossible act will not be ordered. Bristol R. Co., 3 Q. B. D. 10.

Exemptions from such power.

Nothing in this section shall be deemed to authorise any High Court—

(*f*) to make any order binding on the Secretary of State for India in Council, on the Governor-General in Council, on the Governor of Madras in

Council, on the Governor of Bombay in Council, or on the Lieutenant-Governor of Bengal ;

Denman C. J. said : "That there can be no mandamus to the sovereign there can be no doubt both because there would be an incongruity in the Queen commanding herself to do an act and also because disobedience to the writ of mandamus is to be enforced by attachment."—*R.* v. *Powell*, 1 Q. B. 361.(1) Still it is not to be supposed that persons aggrieved are altogether without a remedy. Griffith's Civil Procedure Code, p. 151, contains a chapter of fourteen sections entitled "Suits by or against Government or public officers." This of course has to do with the mode of procedure it does not profess to give a remedy where none existed ordinarily as did the writ of mandamus. The prerogatives of the crown may be and are openly discussed and investigated in courts of justice and the crown "allows a remedy against itself for any infringement of the subject's right provided such remedy be sought where it can be had." Broom's Constitutional Law, note to the Banker's Case 14, State Trials 1. The constitution of England said Lord Holt, 14 St. Jr. 784, "has wisely distributed to several courts the determination of proper causes but has left no subject in any case where he is injured without his adequate remedy if he will go to the proper place for it." For an illegal invasion of his liberty he should proceed by writ of habeas corpus;—See Act X of 1875 and Griffith's Criminal Procedure Code, ch. xxxvii respecting directions of the nature of a habeas corpus—to obtain the revocation of a crown grant whether for inventions or of property by writ of *scire facias*, as to Indian patents for inventions, see Act XV of 1859; for an illegal invasion of the right of property he should proceed by petition of right. A petition of right is in England the appropriate mode of procedure where the crown has through misinformation or inadvertence possessed itself of the lands, goods or money of a subject the object of the petition being to obtain restitution or compensation where restitution cannot be had. It is also appropriate where the claim arises out of a contract as for goods supplied to the crown or for the public service.—*Baron de Bode* v. *Q.*, 8 Q. B. 208, 3 H. L. Cas. 449;

(1) A mandamus was granted against the Queen's tax commissioners. *Q.* v. *C.*, 21 Q. B. D. 313; but refused against the Secretary of State for War.—*R.* v. *S.*, 1891; 2 Q. B. 326.

Churchward v. *Q.*, 6 B. & S. 807; L. R. 1 Q. B. 73; *Q.* v. *Com. of Inland R.*, 21 Q. B. D. 569. *Semble*, it might be made available for the recovery of a legacy.—*Eyres* v. *Duke of Wellington*, 9 Bea. 579.

(*g*) to make any order on any other servant of the Crown, as such, merely to enforce the satisfaction of a claim upon the Crown; or

(*h*) to make any order which is otherwise expressly excluded by any law for the time being in force.

Application how made.

46. Every application under Section 45 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof; and the High Court may, in its discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made.

Procedure thereon.

Order in alternative.

If, in the last case, the person, Court or corporation complained of shows no sufficient cause, the High Court may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the High Court fixes in this behalf.

Peremptory order.

47. If, the person, Court or corporation to whom or to which such order is directed makes no answer, or makes an insufficient or a false answer, the High Court may then issue a peremptory order to do or forbear the act absolutely.

Execution of, and appeal from, orders.

48. Every order under this chapter shall be executed, and may be appealed from, as if it were a decree made in

the exercise of the ordinary original civil jurisdiction of the High Court.

See Griffith's Civil Procedure Code, pp. 79-131, 183-209.

49. The costs of all applications and orders under this chapter shall be in the discretion of the High Court.

Costs.

A court has inherent jurisdiction on equitable grounds of ordering a party who wrongly sets it in motion to pay the costs. I. R. Bombay Civil Fund Act, 1882; C. A. 40 Ch. Div. 288.

50. Neither the High Court nor any Judge thereof shall hereafter issue any writ of *mandamus*.

Bar to issue of *mandamus*.

"*Any writ of mandamus.*" This includes the high prerogative and statutory writs. A mandamus to examine witnesses in India under 13 Geo. III, c. 63, would be called a statutory mandamus.

51. Each of the said High Courts shall, as soon as conveniently may be, frame rules to regulate the procedure under this chapter; and until such rules are framed, the practice of such Court as to applications for and grants of writs of *mandamus* shall apply, so far as may be practicable, to applications and orders under this chapter.

Power to frame rules.

PART III.

OF PREVENTIVE RELIEF.

The student of comparative jurisprudence may find the following sketch of the history of injunctions (taken from Mr. Griffith's Institutes of Equity, pp. 247-253) interesting and its statement of principles instructive.

Injunctions.

I. *Interlocutory and Final.*
II. *To restrain Proceedings in other Courts.*

I. Not only do the courts of equity investigate, adjudicate upon, and enforce equitable rights by decree, they also interfere

in a summary way to prevent or stay the commission of an injury by an order called an injunction. Thus, pending litigation, the property is taken into the custody; forged bills of exchange, and other like documents obtained through fraud, and instruments which may be used wrongfully, are ordered to be given up or cancelled. The committing of waste, the destruction of an easement, as by building opposite to windows, is restrained. An interim order for an injunction may be obtained, and that either ex parte or on notice. If the plaintiff seeks it ex parte, he must bring all material facts to the knowledge of the court.—*Fuller* v. *Taylor*, J. (63), 743, V.-C. Wood. A stronger case of acquiescence is necessary for defence at the hearing than on an interlocutory motion.—*Johnson* v. *Wyatt*, J. (63), 1333, L.J. The interim order is made on the condition of the plaintiff undertaking to abide by an order to be made as to damages, in case the court should thereafter be of opinion that the defendant had sustained any damages by the injunction which the plaintiff ought to pay, and sometimes on the further condition that plaintiff will accept short notice of motion to dissolve the injunction.

The utility of the remedy by injunction is very apparent in cases where, though the common law courts will give a remedy, irreparable damage may be done meanwhile. These cases are exceptional, for where there is an entire want of privity between plaintiff and defendant, and the defendant is a mere wrong-doer at law, the equity courts do not usually interfere.

Thus, where a miller let down water so as to inundate his neighbour relief was granted. So where a railway company blocked up the access to the station of the plaintiffs, another railway company, by a strong barrier or stockade, partly on a public footpath and partly on lands belonging to the plaintiffs, and the plaintiffs filed a bill alleging that the injury would be irreparable and that the defendants had no colour of title, Vice-Chancellor Wood granted an interim injunction to restrain the trespass, though by a stranger.—*London and North-Western Railway Company* v. *Lancashire and Yorkshire Railway Company*, 4 E. C. 174.

A prayer for a writ of injunction may be added whenever required to the prayers in ordinary bills. One advantage of

the addition is that the writ may be obtained, should the subsequent conduct of the defendant render it necessary, with rapidity.

II. The student of Roman law can hardly have failed to perceive the analogy of the injunction to the interdicta exhibitoria, prohibitoria, restitutoria. It is very marked in the fact that on principles of equity the interdict restrained, as the injunction does at the present day, common law actions. We purpose to say a few words on the controlling power exercised by the equity courts of the Chancery, (1.) Over other courts; (2.) Over applications to parliament.

(1.) The dispute between Coke, L. C.J., and Ellesmere, L.C., touching this jurisdiction is related in our chapter on the Origin and History of the Chancery. It is to be remarked that the chancery court does not act as a court of appeal; it merely prevents an unconscientious use being made of strict legal process by fraud or accident, and bills in the nature of a new trial are discouraged. And the court will not, at least at the present day, allow its process to be made auxiliary to a new jurisdiction, as that of Inclosure Commissioners, on the mere ground that they have miscarried.—*Bateman* v. *Boynton*, 1 C. A. 368, L.J. It might have been thought that an action at law would have been rendered independent of the Chancery by those sections of the Common Law Courts Procedure Act, 1854, which enable them to award writs of injunction against the repetition of an actionable wrong, and make it lawful for the defendant, or the plaintiff in replevin, in any cause in which if judgment were obtained he would be entitled to relief against such judgment on equitable grounds, to plead the facts, which entitle him to such relief, by way of defence, and for the plaintiff to avoid such plea on equitable grounds. The reason why such is not the case is that these courts cannot mould their judgments for a decision of part of a question, nor make a modified decision pro tempore, reserving for future consideration the position of claimants yet in their infancy or yet to be born, their and other rights. The issues in the common law pleadings result in unconditional decisions, yes or no, on the questions: Was there a right in the plaintiff? Was there a breach or injury by the defendant? It is, therefore, only where Chancery would grant a decree without condition, doing thereby final if not complete

justice, that equitable defences and replications are permitted. —*Wakley* v. *Froggart*, C.E., J. (63), 1248. Again, the new jurisdiction is permissive; it does not abrogate, but is concurrent with, that of the Chancery.—*Stewart* v. *The Great Western Railway Company*, (65), 627, L.C. Westbury.

A defendant who is prosecuted both in Chancery and at Law for the same matter might, after complying with certain pleading regulations, obtain an order that the plaintiff elect in which court he will proceed. Cons. Ord. xlii, r. 5.

Proceedings in the Ecclesiastical, Admiralty, County, and recently in the Divorce and Matrimonial Cause Court, in a suit for restitution of conjugal rights, have been restrained. The case from the Divorce Court was that of *Hunt* v. *Hunt*. The question was the obligatory force of an agreement in a separation deed not to sue for restitution. Ex relatione the writer, and J. (62), 85. Whether that eminent equity jurist, Lord Chancellor Westbury, did not, in deciding that such an agreement was obligatory, somewhat infringe on the policy and intention of the act establishing the Court of Divorce and Matrimonial Causes, is open to doubt. See and consider *Anguez* v. *Anguez*, 1 P. M. & D. 176; *Williams* v. *Williams*, S. K. 178; *Rowley* v. *Rowley*, 1 H. L., S. & D. 63. *Hunt* v. *Hunt* was upheld in Besant, 12 Ch. Div. 605; Hart, 18 Ch. Div. 670.

(2) While the courts of equity and law declare and enforce rights, it rests in the wisdom of the legislature to create new and abrogate old ones. It is difficult to conceive how an application to parliament can, in accordance with the theory of the constitution, be enjoined. There have been cases, however, in which such application has been in effect enjoined. The use of funds for obtaining an Act of Parliament to extend the purposes of a company has been restrained on the ground of breach of trust.—*Heathcote* v. *North Staffordshire Railway Company*, 2 M. & G. 100; *At.-Gen.* v. *Corporation of Norwich*, 16 Sim. 225. And where the directors of a railway company gave a check for 10,000*l.* to their engineer, it being supposed that the money was to be employed in applications to parliament, he was ordered to account.—*Gray* v. *Whalley*, "The Times," 23rd Feb. 1864.

In *Stevens* v. *The South Devon Railway Company*, 20 L. J., C.

491, Lord Romilly held that the principles applicable to private partnerships were not to be applied too strictly to companies with public duties and interests, and allowed the directors, though opposed by one class of shareholders, to apply to parliament, but not to use for that purpose the company's funds. In *Steele* v. *North Metropolitan Railway Company*, 2 C. A. 237, Lord Chelmsford said that the court had power to restrain an application to parliament, but it was difficult to conceive a case in which it would be done. And accordingly, where an agreement as to the purchase of land had been inserted in a railway bill, and opposition in parliament was consequently foregone, an application by the company to parliament to repeal the agreement was not forbidden.

When the Common Law Courts of England were united with the Equity Courts (Judicature Act, 1873, s. 25.) Section 8 enacted that "an injunction or mandamus may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked either before at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass such injunction may be granted if the court shall think fit whether the person against whom the injunction is sought is or is not in possession under any claim of title or otherwise and (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title and whether the estates claimed by both or either of the parties are legal or equitable."

The English system further provides for the inspection of articles and the sale of those which are of a perishable nature. R. S. C. O. L.

CHAPTER IX.

OF INJUNCTIONS GENERALLY.

52. Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

Preventive relief how granted.

"*Discretion.*" It is not enough that there is a point to be decided which the plaintiff is fairly raising for there is a further question namely whether interim interference on a balance of convenience or inconvenience to the one party or other is or is not expedient.

Where the alternative is interference or probable destruction of the property then the court is very ready to lend its aid immediately even at considerable risk that it may be encroaching on what may turn out eventually to be the legal rights of the defendant.—*Wilson* v. *Wilson*, 1 H. L. C. 538. Should however the injury threatened to the plaintiff be limited to his being retarded or embarrassed by the new contract or deed the court will more readily listen to suggestions by the defendant that his rights will be prejudiced by interference.—*Shrewsbury Rail.* v. *S. & B. Rail.*, 20 L. J. 574 Ch.

The cases in which the English Chancery granted an injunction on proceedings in another court are not applicable to India, where the court of proceeding can inquire into the matter. Since the present Act only a higher court can grant an injunction to a subordinate court. A co-ordinate court cannot—*Dhuromdhur* v. *Agra Bank, Limited*, I. L. R. 4 C. S. 380.

53. Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.

Temporary injunctions.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit: the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

Perpetual injunctions.

"*Code of Civil Procedure.*" See Griffith's edition, pp. 166-168, sections 492 & 493 are as follows: Section 492, "If in any suit it is proved by affidavit or otherwise (a) that any property in dispute in a suit is in danger of being wasted, damaged or

alienated by any party to the suit or wrongfully sold in execution of a decree, or (b) that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, the court may by order grant a temporary injunction to restrain such act or give such other order for the purpose of preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit or refuse such injunction or other order." Section 493, "In any suit for restraining the defendant from committing a breach of contract or other injury whether compensation be claimed in the suit or not the plaintiff may at any time after the commencement of the suit and either before or after judgment apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right. The court may by order grant the injunction on such terms as to the duration of the injunction keeping an account giving security or otherwise as the court thinks fit or refuse the same." The section then proceeds to provide for cases of disobedience. The next section directs notice to be given to the opposite party, section 495 makes an injunction to a corporation binding on its members and officers. Any order for an injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied with such order, s. 496. The next section enables the court to award compensation to the defendant for issue of injunction on insufficient grounds. The Indian cases decided upon these sections are set out in Mr. Griffith's Commentaries, p. 166, &c. And the modern English cases in which injunctions have been granted or refused at pp. 364 & 365.

"*Wasting*." It is waste to change the nature and value of the property as by destroying works of irrigation, removing principal buildings, cutting down timber unfit for use or adapted only for ornament.—*Lowndes* v. *Bettle*, 10 Jur. N. S. 226. Taking away minerals though a destruction of property is not necessarily waste when so doing is the proper usufruct of them. —*Haigh* v. *Jaggar*, 2 Coll. C. C. 231.

Pending a suit to enforce a general claim against a man there cannot be an injunction to restrain him from dealing with or

parting with property not being property specifically in dispute in the suit.—*Robinson* v. *Pickering*, 16 Ch. Div. 660.

A purchaser alleging fraud in the seller to him of large iron works obtained an injunction to restrain for a time the seller and the seller's money into whose name the investments of the purchase-money had been transferred from parting with the purchase-money.—*Small* v. *Attwood*, 1 Younge 533.

Upon an undertaking by the plaintiff to have the affidavit re-sworn and filed a temporary injunction extending over the next motion day was granted in an action where the affidavit in support of the application had been sworn two days before the issue of the writ.—*Green* v. *Prior*, W. N. 1886, 50.

A motion to discharge an ex parte injunction on the ground of its having been obtained by misrepresentation is proper although the injunction is about to expire.—*Wimbledon Local Board* v. *Croydon Sanitary Authority*, 32 Ch. Div. 421.

A plaintiff to whom an interlocutory injunction was granted gave an undertaking to pay damages. Subsequently the defendant died and the action was continued against his heiress at law and executor was dismissed with costs. *Held*, that the heiress at law was entitled to an enquiry as to damages.—*Sheppard* v. *Gilmore*, W. N. 1887, 242.

An undertaking as to damages is not to be confined to damages sustained by the party against whom the injunction is granted. —*Tucker* v. *New Brunswick Trading Co.*, 44 Ch. Div. 249.

An application for an interim injunction to restrain the publication of a statement in a peerage as to the legitimacy of applicant refused. No case being shown for exceptional interference of court.—*Poulet* v. *Chatto and Windus*, C. A. W. N. 1887, 230.

A libel will not be temporarily restrained when there is collusion between the parties.—*Monson* v. *Tussaud*, 9 Rep. 177, 1894; 1 Q. B. 671.

CHAPTER X.

OF PERPETUAL INJUNCTIONS.

The remedy of specific performance relating as it does to active duties deals in the main only with contracts, while the remedy of injunction having to deal only with negative duties deals not only with contracts but also with torts and with many other subjects; among them, subjects of a purely equitable nature. Specific performance is a primary remedy when granted without regard to the question whether damages could be accurately computed for a breach of the duty in question. It is a primary remedy in sales, leases and other dispositions of land. Injunction is the primary remedy in many other classes of cases than those relating to land.

(1) When an unwarrantable advantage of the process of law is taken as by levying a judgment after a compromise or upon property not subject thereto.

(2) Alienation of personalty as where the title to stock is in dispute under two wills or where the title is controverted between principal and agent.

(3) Inequitable sales as where a party is abusing a trust or other authority.

Generally in cases of fraud, accident and mistake equity has an original and primary jurisdiction. (Griffith's Institutes, p. 175.) And it follows that an injunction to restrain the taking of an advantage in such cases might regularly be granted without inquiring whether damages could not be accurately computed and made a just equivalent in favor of the plaintiff. 1886, Story, § 861.

Whenever the parties are resident within a country the courts of that country have full power to act upon them personally with respect to the subject of suits in a foreign country as the ends of justice may require and with that view to order them to take or omit to take any steps or proceedings in any other court of justice whether in the same country or in any foreign country.—*Hope* v. *Carnegie*, L. R. 1 Ch. 320, (foreign administration).—*Baillie* v. *Baillie*, L. R. 5 Eq. 175; E. P. Tait, L. R. 13 Eq. 311; T. R. Chapman, L. R. 15 Eq. 95.

Undue and vexatious litigation in the home country may be enjoined.—*McHenry* v. *Lewis*, 21 Ch. Div. 202; 22 Ch. Div. 397; *Dawkins* v. *Saxe Weimar*, 1 Q. B. D. 499.

Perpetual injunctions when granted.

54. Subject to the other provisions contained in, or referred to by, this chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

What has been said of the English Judicature Act may with equal propriety be said of the Specific Relief Act. The legislature "has somewhat enlarged the powers of the court but in the matter of injunctions it has done nothing to alter the principles which have been laid down as to the exercise of its powers where principles have been established as just and convenient.—Thesiger, L. J., *Gaskin* v. *Balls*, 13 Ch. Div. 329.

"*Just.*" Justice in its most comprehensive sense includes equity. Equity, Justice and Equality are defined or described by Mr. Griffith in the Institutes of Equity, pp. 20—22.

"*Convenient.*" In doubtful cases arguments drawn from inconvenience are of great weight. Coke Litt. 66a; 6 Cl. & Fi. 671; 1 H. Black. 61. And so arguments of inconvenience are sometimes of great force in construing a written instrument as to the question of intention when equivocal expressions are used. Yet where the words admit only of one meaning, inconvenience proves only a want of foresight in the settler and does not justify the court in departing from the words. The same is the rule where a proposition of law requires interpretation.—*Pike* v. *Hoare*, 2 Eden. 184; 3 B. & C. 471. Defects in the law are to be remedied by the legislature not the judge. The judge interprets he does not make the law. Vaughan, 37, 38. However the law will more readily suffer a private mischief than a public inconvenience. Coke Litt. 97 b.; Hobart 224.

In construing an act of the legislature the same principle applies. Where the words have a necessary meaning that must be adopted whatever be its inconvenience. 1 Cl. & Fi. 546. "But unless it is very clear that violence would be done to the language of an act by adopting any other construction any great

result which might result from that suggested may certainly afford fair ground for supposing that it could not be what was contemplated by the legislature and will warrant the court in looking for some other interpretation.—*Doe* v. *Norton*, 11 M. & W. 928; Broom Ch. Div. IV.

Griffith's Civil Procedure Code, s. 493, speaks of contract and compensation, see p. 171.

"*Contract.*" The question may be simply one of contract or be governed by the doctrine of notice. Plaintiffs had erected a new cupola clock and bell and in consideration thereof the defendants had contracted that the ringing a church bell at a certain hour in the morning should be discontinued during the lives of the plaintiffs and the survivor of them. An injunction against the breach of the contract was granted which the contract being a negative one was tantamount to a specific performance.

Where there is a contract of sale and purchase with mutual restrictive covenants as to the use of land sub-purchasers taking with notice of such restrictions are bound thereby. As to the imputation of notice the evidence and scope of each case must be weighed.—*Keates* v. *Lyon*, L. R. 4 Ch. 218; *Renals* v. *Cowlishaw*, 9 Ch. Div. 124; 1 Ch. Div. 866; *Master* v. *Hansard*, 4 Ch. Div. 718; *Kemp* v. *Bird*, 5 Ch. Div. 978.

Where a contract has been broken it is no defence that the other party has suffered no damage it is for the other party to judge whether he will insist upon specific performance or not.—*A. G.* v. *Mid. Kent*, L. R. 3 Ch. 100; *Manners* v. *Johnston*, 1 Ch. Div. 673. Tenders for a supply of stone having been invited by X it was agreed by A, B, C & D quarry owners that B should not tender that C & D should tender above A's price and that A should buy certain quantities of B, C & D. B did tender and the tender was accepted. A obtained an injunction against B who was thus left liable to a suit for damages by X.—*Jones* v. *North*, L. R. 19 Eq. 426.

Where a contract is executed already the breach of one covenant may be enjoined though there be other covenants the breach of which could not be enjoined.

"*Pecuniary compensation cannot be got*" as where a defendant

is a pauper and has committed a trespass entitling to substantial damages.—*Hodgson* v. *Duck*, 2 Jur. N. S. 1014.

In connection with sales and buyings of land injunctions have been granted by the English courts not against action by mortgagee for mortgage debt after contract to sell, for deposit by purchaser pending seller's action for specific performance, breach of covenant where it has not been displaced by acquiescence; but against carrying on business after sale of goodwill; against ejectment by judgment-creditor of purchaser in possession; grantee of riparian owner only if damage proved; landlord vendor distraining pending completion; payment of money for purchase until discharge of solicitor's lien; polluting percolating underground water; purchaser from heir or devisee paying purchase-money away from creditor resale by vendor pending contract; sale by trustees in breach of trust; against waste by purchaser in possession; withdrawing support of contiguous ground or house; against railway company for mortgagee; for person whose estate has determined since notice to quit; against railway entering, taking part only of house, working traffic on failure to pay. Sugden's Vendors and Purchasers. Griffith's Indian Trusts Act. An act for the acquisition of land for public purposes and for Companies Act X of 1870.

If buyer and seller quarrel and both claim the deposit the auctioneer may bring a suit of interpleader and obtain an injunction on payment of the money into court.—*Farebrother* v. *Prattent*, 5 Pri. 303. A seller will be enjoined against conveying away the legal estate or selling it to a third person. Sugden, 5th April 1813. So injunctions may be granted against the agents of the parties. S., 5th April 1813; but the seller's agent is not a trustee for the buyer.—*Sainsbury* v. *Jones*, 2 Bea. 462.

One of several co-sharers in a mahal having begun to erect certain kachcha buildings upon the common land another co-sharer 3 or 4 days after the building had commenced brought a suit for an injunction to restrain the continuance thereof on the ground that the defendant was ousting the plaintiff as a co-sharer from a portion of the common land. It was found that the defendant was building upon land which was in excess of the share that would come to him on partition and that on partition the plaintiff could not be adequately compensated.

Held, that the plaintiff was entitled to a perpetual injunction against further building directing the existing building to be pulled down and prohibiting future building as exclusive owner. On appeal it rests on appellant to show that discretion had been wrongly exercised. Straight, J., and Griffith's Evidence Acts.—*Shadi* v. *A. Singh*, I. L. R. 12 A. S. 436.

When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act.

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases (namely) :—

(*a*) where the defendant is trustee of the property for the plaintiff;

(*b*) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

Damages were given for obstruction from part of building already erected, and an injunction against further erections. Dreyfus, 1894, 1 Ch. Div. 276.

(*c*) where the invasion is such that pecuniary compensation would not afford adequate relief;

(*d*) where it is probable that pecuniary compensation cannot be got for the invasion;

(*e*) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Explanation.—For the purpose of this section a trademark is property.

See note p. 175-177.

Illustrations.

(*a.*) A lets certain land to B, and B contracts not to dig sand or gravel thereout. A may sue for an injunction to restrain B from digging in violation of his contract.

(*b.*) A trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent the breach.

(*c.*) The directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them.

(*d.*) The directors of a fire and life insurance company are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them.

(*e.*) A, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The Court may grant an injunction to restrain him from getting in the assets.

(*f.*) A, a trustee for B, is about to make an imprudent sale of a small part of the trust-property. B may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.

(*g.*) A makes a settlement (not founded on marriage or other valuable consideration) of an estate on B and his children. A then contracts to sell the estate to C. B or any of his children may sue for an injunction to restrain the sale.

(*h.*) In the course of A's employment as a vakil, certain papers belonging to his client, B, come into his possession. A threatens to make these papers public, or to communicate their contents to a stranger. B may sue for an injunction to restrain A from so doing.

(*i.*) A is B's medical adviser. He demands money of B which B declines to pay. A then threatens to make known the effect of B's communications to him as a patient. This is contrary to A's duty, and B may sue for an injunction to restrain him from so doing.

(*j.*) A, the owner of two adjoining houses, lets one to B and afterwards lets the other to C. A and C begin to make such alterations in the house let to C as will prevent the comfortable enjoyment of the house let to B. B may sue for an injunction to restrain them from so doing.

(*k.*) A lets certain arable lands to B for purposes of husbandry, but without any express contract as to the mode of

cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the lands with seed injurious thereto and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husbandlike manner.

(*l.*) A, B, and C are partners, the partnership being determinable at will. A threatens to do an act tending to the destruction of the partnership-property. B and C may, without seeking a dissolution of the partnership, sue for an injunction to restrain A from doing the act.

(*m.*) A, a Hindú widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir-expectant may sue for an injunction to restrain her.

(*n.*) A, B, and C are members of an undivided Hindú family. A cuts timber growing on the family property, and threatens to destroy part of the family-house and to sell some of the family utensils. B and C may sue for an injunction to restrain him.

(*o*) A, the owner of certain houses in Calcutta, becomes insolvent. B buys them from the official assignee and enters into possession. A persists in trespassing on and damaging the houses, and B is thereby compelled, at considerable expense, to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass.

(*p.*) The inhabitants of a village claim a right of way over A's land. In a suit against several of them, A obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A for obstructing his alleged right of way over the land. A may sue for an injunction to restrain them.

(*q.*) A, in an administration-suit to which a creditor, B, is not a party, obtains a decree for the administration of C's assets. B proceeds against C's estate for his debt. A may sue for an injunction to restrain B.

(*r.*) A and B are in possession of contiguous lands and of the mines underneath them. A works his mine so as to extend under B's mine and threatens to remove certain pillars which

help to support B's mine. B may sue for an injunction to restrain him from so doing.

(*s.*) A rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, B. B may sue for an injunction restrianing A from making the noise.

(*t.*) A pollutes the air with smoke so as to interfere materially with the physical comfort of B and C, who carry on business in a neighbouring house. B and C may sue for an injunction to restrain the pollution.

(*u.*) A infringes B's patent. If the Court is satisfied that the patent is valid and has been infringed, B may obtain an injunction to restrain the infringement.

(*v.*) A pirates B's copyright. B may obtain an injunction to restrain the piracy, unless the work of which copyright is claimed is libellous or obscene.

(*w.*) A improperly uses the trademark of B. B may obtain an injunction to restrain the user provided that B's use of the trademark is honest.

(*x.*) A, a tradesman, holds out B as his partner against the wish and without the authority of B. B may sue for an injunction to restrain A from so doing.

(*y.*) A, a very eminent man, writes letters on family-topics to B. After the death of A and B, C, who is B's residuary legatee, proposes to make money by publishing A's letters. D, who is A's executor, has a property in the letters, and may sue for an injunction to restrain C from publishing them.

(*z.*) A carries on a manufactory and B is his assistant. In the course of his business, A imparts to B a secret process of value. B afterwards demands money of A, threatening, in case of refusal, to disclose the process to C, a rival manufacturer. A may sue for an injunction to restrain B from disclosing the process.

(a.) Illustration *b*—*g*.

Where a legal practitioner sold his business and covenanted with the purchaser not to practice within Great Britain during a period of twenty years he was enjoined from doing so.—*Whittaker* v. *Howe*, 3 Bea. 383 ; *Giles* v. *Hart*, 5. Jur. N. S. 1381.

As to contracts in restraint of trade, see Tailors of Lichfield, 11 Coke 53a.—*Rousillon* v. *Rousillon*, 14 Ch. Div. 351. Badische 1892, 3 Ch. Div. 447; Nordenfelt 1894, A. C. 545. The lease of a house and the good-will of the trade of a cheesemonger were sold and assigned upon an oral understanding that the vendor should not set up the same trade in the same street. He was enjoined by decree from doing so.—*Harrison* v. *Gardner*, 2 Mad. 198.

Should a man make a representation on the faith of which another alters his position, enters into a deed or incurs an obligation the man making it is bound to perform that representation no matter what it is whether it is for present payment or for the continuance of payment of an annuity or to make a provision by will. That in the eye of equity is a contract an engagement which the man is bound to perform. Griffith's Indian Evidence Acts, pp. 229-240.—*Dashwood* v. *Jermyn*, 12 Ch. Div. 781. But in all such cases the man must be brought face to face with the promisee. S. C. The defendant being possessed of certain leasehold estates sublet part of the premises to the plaintiff on the strength of a representation that he the defendant was prevented by covenant from building so as to obstruct the sea view. He consequently obtained a higher price. Standing by whilst the sub-lessee built houses whose value greatly depended on the sea view he was enjoined by the court from building himself so as to obstruct the sea view of the plaintiff's houses.—*Piggot* v. *Stratton*, 29 L. J. Ch. 1. Div.

See Griffith's Indian Trusts Act, pp. 83—86, 107.

A trustee who protects by suit or otherwise the title of the property and deals with it as carefully as a man of ordinary prudence would deal with such property if it were his own is not as a rule liable for a breach of trust committed by a co-trustee. But "in the absence of an express declaration to the contrary in the instrument of trust a trustee is so liable. Where he has delivered trust property to his co-trustee without seeing to its proper application. Where he allows his co-trustee to receive trust property and fails to make due inquiry as to the co-trustee's dealings therewith or allows him to retain it longer than the circumstances of the case reasonably require. Where he becomes aware of a breach of trust committed or intended by

his co-trustee and either actively conceals it or does not within a reasonable time take proper steps to protect the beneficiary's interest. A co-trustee who joins in signing a receipt for trust property and proves that he has not received the same is not answerable by reason of such signature only for loss or misapplication of the property by his co-trustee."

The doctrine that an injunction will not be granted where a beneficiary has a personal remedy against the trustee and the damage is therefore not irreparable is no longer law. A threatened breach of trust will be enjoined.—*Wiles* v. *Gresham*, 1 Eq. R. 348; *Balls* v. *Strutt*, 1 Hare 346. Although a trustee having power to appoint new trustees may after suit commenced do so, he will be enjoined unless he obtains the sanction of the court. —*Webb* v. *Shaftesbury*, 7 Ves. 487. Insolvent trustees have been restrained from obtaining possession of the estate.—*Taylor* v. *Atkins*, 213. A trustee in whom was vested a mortgage trust for sale has been enjoined from selling until he had given notice to the mortgager.—*Harding* v. *Pingey*, 10 Jur. N. S. 872; *Macleod* v. *Jones*, 24 Ch. Div. 289. Where a trustee without authority sold lands purchased with trust money the injunction was postponed to an inquiry as to whether the sale would be beneficial to an infant beneficiary.—*Wiles* v. *Gresham*, L. R. 1 E. 348; 5 D. M. & G. 770. See Griffith's Indian Trusts Act.

It is the duty of trustees to restrain a tenant for life from committing waste.—*Pugh* v. *Vaughan*, 12 Bea. 517; *Powys* v. *Blagrave*, 4 D. M. & G. 448.

Where trustees of a term are made unimpeachable for waste they must use their implied power of cutting timber in as provident a manner as the court would.—*Downshire* v. *Sandys*, 6 Ves. 107. Where a discretionary power is given to trustees to cut timber they will not be enjoined at the instance of a legal tenant for life also entitled to cut timber.—*Kekewick* v. *Marker*, 3 M. & G. 311. And where the power is given to trustees for a definite purpose the tenant for life may be restrained until that purpose is satisfied.—*Briggs* v. *Earl of Oxford*, 1 D. M. & G. 363. Griffith's Indian Trusts Act.

Other instances where the defendant has been enjoined to undo what he has done instead of paying damages may be found

in L. R. 20 Eq. 500; L. R. 3 Eq. 465.—*Dent* v. *Auction Mart*, L. R. 2 Eq. 238; 10 Ch. Div. 283; 11 Ch. Div. 146.

The court when asked by perfectly honest shareholders to restrain a dishonest act on the part of the directors may enjoin even the resolutions of a meeting voluntarily to wind up a company. British Water Gas Syndicate, W. N. 1889, 204.

See note to 54*h*.

Kernaghan v. *Williams*, L. R. 6 Eq. 228; *Pickering* v. *Stephenson*, L. R. 14 Eq. 322. A railway company has no power to expend its funds in the prosecution of a suit not instituted by it and will at the instance of a shareholder enjoin its doing so without inquiring whether the suit is for the benefit of the company or not. 6 Eq. 228.

Injunctions have been granted to restrain a married woman from acting as an executrix when her husband is not amenable to the process of the court; to restrain an insolvent executor from receiving the assets, and the official assignee from paying over the fund to him; to restrain a creditor from taking separate proceedings, and that even when suing for unascertained damages or taking proceedings in a foreign country; (such an injunction may be obtained by a legatee as well as by the plaintiff or defendant in the administration suit). Proceedings separately taken against the heir have been enjoined. An injunction to an executor not to part with the assets is no ground for enjoining a creditor's action where his debt is not admitted. The controverting a will in the probate court has been enjoined so also has the publication of the testator's letters. Executors and Administrators, by Sir E. V. Williams; and (q) & (y).

A pastor lawfully dismissed from his church may be enjoined from attempting to continue his ministrations.—*Cooper* v. *Gordon*, L. R. 8 Eq. 249.

In the Institutes of Equity Mr. Griffith observes "Trusts are infinite in purpose and varied in form as business requires." "Provided the settlor avoids trusts forbidden by the policy of the law he may modify his dispositions as he pleases," p. 33. Any one directly affected beneficiary or co-trustee may obtain an injunction against a trustee who violates his duty or exceeds his power. Yet in the absence of corruption or misconduct, the

discretion of trustees in dismissing servants, schoolmasters and others will not be interfered with.—*Hayman* v. *Rugby School*, L. R. 18 Eq. 28. But though not bound by technical rules of evidence they must not proceed contrary to common justice as by denying the parties a hearing, Audi alteram partem, Broom's Maxims.—*Dean* v. *Bennett*, L. R. 6 Ch. 489. When a minister of religion or a schoolmaster is properly dismissed he will be enjoined from attempting to exercise his office.—*Cooper* v. *Gordon*, L. R. 8 Eq. 249. Matters of internal management for which the constitution of a charity has provided a special court as that of a visitor will be relegated to him.—*Thomson* v. *University of London*, 10 Jur. N. S. 669.

The right of a member of a club is based upon his right to use and enjoy the property of the club. And so should a member be improperly excluded whether because there was no inquiry conducted in accordance with the rules of justice, or otherwise an injunction may be obtained against the committee.—*Fisher* v. *Keane*, 11 Ch. Div. 353; *Labouchere* v. *Wharncliffe*, 13 Ch. Div. 346.

See Griffith's Indian Trusts Act, s. 15, ch. vi.

Section 15 requires a trustee to deal with the trust property as carefully as a man of ordinary diligence would deal with his own, pp. 60—65. He is to be impartial, to prevent waste, to keep accounts, to make proper investments, &c. Griffith's Chapter VI, pp. 65—75, defines the beneficiary's rights to rents and profits to specific execution, to inspect accounts and take copies, to transfer of beneficial interest to proper trustees, &c. "The beneficiary has also a right that the trustee shall be compelled to perform any particular act of his duty as such and restrained from committing any contemplated or probable breach of trust by the remedy of injunction whether retrospective or preventive." Griffith's Trusts, pp. 111—121. An injunction to restrain proceedings under an arbitration clause was refused in M'Harg, 1895, May 14.

(*g.*) B and his children fall within the principle of s. 12 a; the purchaser within that of s. 24 d, and the vendor within that of s. 25 c. B or his children should at once give notice of their rights to the purchaser. Sections 5 & 6. Griffith's Indian Trusts Act.

The remedy by injunction is cumulative and does not preclude the injured party obtaining in a proper suit damages consequent upon the divulging a confidential secret.

The doctrine of acquiescence implies a knowledge by the party acquiescing of his own rights and of the acts of the person trespassing upon them; secondly, that the trespasser has acted under a mistake, and so acting laid out money or done some act because he was mistaken.—*Willmott* v. *Barber*, 15 Ch. Div. 96; *Beauchamp* v. *Winn*, L. R. 6 H. L. 223. The doctrine does not completely supersede the periods fixed by the Act of Limitation but leads the court to refuse particular remedies where the plaintiff is not free from blame.

What is acquiescence as a matter of evidence must vary with the business. A person may acquiesce in a breach of covenant in notice of refusal to perform; both parties may acquiesce in non-completion.

Where the purchaser of part of an estate seeks to restrain a purchaser of another part from breaking a covenant intended to bind all the purchasers for their common benefit he does not require the vendor's co-operation nor need he prove damages in order to obtain the injunction.—*Collins* v. *Castle*, 36 Ch. Div. 243.

(*j.*) (*k.*) In cases of landlord and tenant a tenant has been enjoined from converting a house to a different use from that prescribed by the lease; from violating a covenant by breaking up meadow land; from taking away crops and manure contrary to the usual course of husbandry; from removing fixtures; and from any other breach of a covenant. 6 Vesey 106; 5 Bea. 250.—*City of London* v. *Pugh*, 4 Bro. P. C. 395. But the injunction like the decree for specific performance is governed by the discretion of the court.—*Doherty* v. *Allman*, 3 App. Cas. 709.

Nice questions frequently arise upon applications to a Judge to enjoin parties from removing alleged fixtures. There are few subjects where the opinions of the court have varied more widely or where it is more difficult to lay down any rule which shall enable us to solve new cases as they arise. A landlord is not liable for personal injuries caused to a stranger by the dilapidated condition of demised premises. Copp. 1895, May 14.

(*l.*) Partnership articles contained a covenant that should one of the partners wish to dispose of his interest in the firm he must

first offer it to the others. An injunction was granted to prevent his violating the stipulation.—*Homfray* v. *Fothergill*, L. R. 1 Eq. 567. A business was carried on in several places, of one the lease expired, a partner contrary to the wishes of the rest obtained a renewal of the lease he was prevented from using the credit or assets of the firm at such place.—*Clements* v. *Norris*, 8 Ch. Div. 134.

Partnership is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business and to share the profits thereof between them. Contract Act, s. 239.

To prevent a partner from acting contrary to the agreement into which he may have entered with his co-partners or contrary to the good faith which independently of any agreement is to be observed by one partner towards his co-partner the Court appoints a receiver and takes the affairs of the business out of the hands of all the partners or grants the less drastic remedy of injunction against one or more of the partners. The English courts have enjoined actions for the balance of settled accounts others being unsettled; executions against firm for separate debt of one partner; advertising dissolution; altering principle on which profits are dealt with; change of character of business; opening letters; use of names by continuing partners, by successors; misapplication of firm's money; misconduct conducing to dissolution; improperly getting in assets; negotiating bills; carrying on business after sale thereof or dissolution; divulging trade secrets; publishing accounts; making slanderous statements; proceedings in insolvency; illegal acts generally. "And in consequence of the liability which attaches to a person who holds himself out as a partner with others and of the danger run by a person who is held out as a partner with others even although it may not be with his consent a court will it seems interfere and restrain a person from holding out another as partner with him without the authority of that other." Lindley, L. J., 5th ed. 544.

One partner will be enjoined from acts tending to depreciate the value of the partnership property and injuring the credit of the firm.—*Marshall* v. *Watson*, 25 Bea. 504; and from disposing of the joint stock to his own private purpose in fraud of his co-partner.—*Hartz* v. *Schrader*, 8 Ves. 317.

With respect to injunctions against companies and their directors a reference is made to Griffith's Indian Companies Act and commentaries for the principles by which courts are guided in interfering in matters of internal management.

The English courts have enjoined

The improper insertion or continuance of a person's name on a company's prospectus or on the register of shareholders; the registry of an improper transfer of shares; the making of calls for illegal purposes; the making of calls on a shareholder induced to become such by fraud; the illegal issue of preference shares; the illegal forfeiture of shares; the unfair use by the company of a creditor's name in a suit against a shareholder; the illegal payment of dividends out of capital or borrowed money, in shares, or improperly declared; the refusal of the vote of a shareholder; making loans to directors; a departure from its main objects, as where (a) a life and fire insurance company seeks to insure ships against perils of the sea; (b) a railway company deals extensively in the purchase and sale of minerals such as coal; (c) a railway company guarantees the dividends of a steam packet company or takes an unauthorised number of shares in another company; the transfer or amalgamation of business in contravention of the English Companies Acts (See Griffith's Indian Companies Act); publication of books and documents inspected under order of court; arbitrating under an ultra vires agreement; prosecuting a suit instituted by a stranger but alleged to be for the benefit of a company; prosecuting proceedings for a libel on the directors; purchase by a company of its own shares; improper application of funds as (a) subscribing to the imperial institute; (b) paying for stamps on proxy forms; (c) printing proxy forms in a way calculated to influence votes; (d) paying for winding up petition presented by directors but opposed by shareholders; (e) giving gratuities to servants and remuneration to directors for past services after dissolution; preventing a person from acting as director; preventing a debenture or stock holder from inspecting the books; the resolutions of meeting convened by directors under a misleading circular which favoured themselves and kept the shareholders in the dark. (Cf.—*Isle of Wight Railway Company* v. *Tabourdin*, 25 Ch. Div. 320.) Lastly the postponing of notice priorities in the voluntary

winding up of a building society has been restrained by injunction. Botten 1895, May 17.

The English Courts have refused to enjoin

The commencement of business or the making calls before the subscription of the nominal capital.

Making calls by directors guilty of improper conduct or upon some members only of an amalgamated company or upon all for the debts of one company, upon improperly relinquished or forfeited shares; borrowing of money; issuing of preference shares; application of money so raised; return of deposits; payment of dividends actually declared or before completion of company's works, or without making good lost capital; continuance of directors in office appointed on removal of others for alleged misconduct; continuance of directors where general meeting might have done so; directors putting their own names on bills of exchange; sailing of ship on a voyage disapproved of; assignment of property to trustees to sell and pay debts; application to a foreign legislature for increased powers; a railway with powers to purchase canal from navigating it, having steam ferry boats from using them for other purposes also; an hotel company from temporarily letting part of its building for other than hotel purposes; a fire insurance company for paying for losses usually paid for but not actually covered by policies; discharge of a servant engaged by the articles of association; non-registry of a transfer of shares; reduction of capital; giving effect to resolutions of a meeting convened by an irregular meeting of directors; dealing by a company at pleasure with its assets at instance of a simple contract creditor; paying pension to family of deceased office. See Lindley, L. J., Law of Companies, p. 596 and Griffith's Indian Companies Act.

The directors of a company may be enjoined from paying dividends out of capital.—*Guiness* v. *Land Corporation of Ireland*, 22 Ch. Div. 349. Flitcroft's case, 21 Ch. Div. 519. But articles of association may provide for working a mine or other depreciating property without recouping the company.—*Lee* v. *Neuchatel Asphalte Co.*, 41 Ch. Div. 1; *Dent* v. *London Tramways*, 16 Ch. Div. 344. The court may after presentation of winding up petition enjoin further proceedings in suits or otherwise. Griffith's Indian Companies Act, s. 134.

Any single shareholder may apply for and obtain an injunction for the purpose of preventing the directors and a majority of shareholders of a registered company from entering into contracts for the carrying on of a trade or business and the accomplishment of objects not warranted by the memorandum and articles of association.—*Simpson* v. *Westminster Palace Hotel Co.*, 8 H. L. C. 12. The court will enjoin a public company which by its deed of settlement was empowered to refuse to authorise a transfer to any person not approved by them, from refusing to transfer at all. Whether it would enjoin them from refusing to transfer to a rival of a doubtful company was considered doubtful.—*Robinson* v. *Chartered Bank*, L. R. 1 Eq. 32. The court has enjoined a railway company from paying dividends out of capital and from prosecuting a suit not instituted by it. Bloxam's case, L. R. 3 Ch. Ap. 337.—*Kernaghan* v. *Williams*, L. R. 6 Eq. 228; also 14 Eq. 322.

A contract for the amalgamation of two joint stock companies is ultra vires and void unless the deed of amalgamation is pursuant to the special powers for that purpose contained in the deeds of settlement of both companies.—*Cork, &c., Railway* v. *Paterson*, 18 C. B. 450. The directors of one company cannot of their own power burden the shareholders with the debts and liabilities of another company. Era Insurance Co., 30 L. J. Ch. 137. A policy holder no less than a shareholder is bound by an amalgamation strictly following the terms of his deed of settlement whether his policy be expressed to be according to the terms of the said deed or not. Cocker's Case, 3 Ch. Div. 1; Dowse's Case, 3 Ch. Div. 384. Two companies amalgamated and an indorsement was made on a policy to the effect that the new company's funds should be liable and future premiums paid to it which was done. *Held*, that the novation of contract was complete. Miller's case, 3 Ch. Div. 391.

The fourth schedule to Griffith's Civil Procedure Code, pp. 257—324 contains (A) a series of plaints adapted to the ordinary concerns of life No. 51—55; (B) of plaints for compensation for breach of contract No. 56—70; (C) of plaints for compensation upon wrongs No. 71—93; (D) of plaints in suits for special property No. 94—98; (E) of plaints in suits for special relief No. 99—113. No. 110 is the form for an injunction to restrain waste.

(*m.*) The illustration is one of destructive waste and exceeds the rights which a tenant for life either expressly under a settlement or impliedly by operation of law is entitled to, namely, the benefit of all fair acts of ownership sometimes spoken of as legal waste.—*Baker* v. *Sebright*, 13 Ch. Div. 179. Such acts of ownership a Hindu widow in some parts of India is entitled to so also is a Hindu holding ancestral or undivided property which he may not alienate to the damage of expectant heirs or coparceners but which he may otherwise enjoy as a prudent owner of property.

(*n.*) A ground landlord may have an injunction to stay waste against an under lessee who holds by lease from the original lessee.—*Farrant* v. *Lovel*, 3 Atk. 723. So a mortgagor may obtain an injunction where a mortgagee in possession cuts timber and does not apply the sale proceeds in keeping down the principal and interest. S. C. It is now settled that an English court will not interfere to prevent merely permissive waste. Viner's Abr. 523. But equity will decree an account where there is an express covenant to repair.—*Marsh* v. *Wells*, 2 S. & S. 87. In Lewis Bowles's 11 Coke 79, it was decided that the words "without impeachment of waste" in a deed give the property. But where this large power is exercised contrary to conscience in an unreasonable manner and to the destruction of the thing the tenant for life will be enjoined.—*Aston* v. *Aston*, 1 Ves. s. 265; *Vane* v. *Lord Barnard*, 2 Vern. 738; *Abrakam* v. *Bubb*, 2 Freem 54, humoursome and extravagant waste.

The cutting of timber left standing for the ornament of a mansion house or grounds will be enjoined.—*Coffin* v. *Coffin*, Jac. 71. As to what is ornament the taste of the testator or settlor must determine not that of the tenant for life.—*Downshire* v. *Sandys*, 6 Ves. 110; *Mahon* v. *Stanhope*, 3 Madd. 523n. The rule has been extended from the ornament of the house to outhouses and grounds then to plantations, vistas, avenues and to all the rides about the estate for miles round.—*Downshire* v. *Sandys*, 6 Vesey 110. Cessante ratione cessat jus and where a tempest has made gaps in ornamental timber the rest may be felled. Even where a mansion house has been pulled down, the ornamental has still been protected on the ground that it improved the value of the estate as one to be developed by building leases.

—*Wellesley* v. *Wellesley*, 6 Sim 497; *Micklethwait* v. *Micklethwait*, 5 W. R. 862. The opening of mines is analogous to the cutting of timber and both an injunction and an account may be obtained.

A tenant for life may not dig for gravel, lime, clay, brick, earth, stone or the like except for the repair of the buildings or the manuring of the land. He may not open new mines nor quarries or work for commercial purposes those previously used for a more restricted end. But he may open new shafts in following an old vein or for supplying air to those engaged. —*Elias* v. *Snowdon Co.*, 4 App. Cas. 454; *Elias* v. *Griffith*, 8 Ch. Div. 532; *Winchester* v. *Knight*, 1 P. Wms. 406.

The jurisdiction by way of injunction in waste may be referred to the broadest principles of social justice. It is exerted where the nature of the injury is such a preventive remedy is indispensable which also may be permanent; where matters of discovery and account are requisite and where equitable rights and injuries call for redress to prevent a malicious, wanton and capricious abuse of the rights of property by persons having but a temporary and limited interest in the subject-matter. Story 919.

As a purchaser under a decree does by the act of purchase submit himself to the jurisdiction of the court he may if he obtain possession of the estate before the contract is completed be enjoined from committing waste. Sugden, 3rd January 1857. So a purchaser in possession who has not paid his money will be restrained from cutting timber.—*Crockford* v. *Alexander*, 15 Ves. 138.

Where timber has been severed by accident or by a stranger or for the improvement of the property the capital proceeds belong to the first owner of the inheritance after the interest thereon has been paid to the tenant for life during his life.— *Garth* v. *Cotton*, 1 W. & T.; *Honywood* v. *Honywood*, L. R. 18 Eq. 306; *Birch-Wolf* v. *Birch*, L. R. 9 Eq. 683; *Lowndes* v. *Norton*, 6 Ch. Div. 139.

The rules respecting waste where timber is a mere incident of an estate do not apply to timber estates, that is estates which are cultivated merely for the produce of saleable timber and where the timber is cut periodically.—*Honywood* v. *Honywood*, L. R. 18 Eq. 306; *Dashwood* v. *Magniac*, 60 L. J. Rep. Ch. 210.

As a general rule which operates more strongly in the absence of a written settlement a tenant for life ought to make all ordinary repairs essential to prevent the destruction of the property but he is not liable to repair extraordinary damages effected by floods, lightening, &c., and it seems sufficient if he leave the premises in as good repair as when he received them saving always reasonable wear and tear.—*Woodhouse* v. *Walker*, 5 Q. B. D. 404.

The modern English authorities or rather dicta upon the question whether an action for permissive waste can be maintained against a tenant for life or years upon whom no express duty to repair is imposed by the instrument which creates the estate "appear to be strangely in conflict with the ancient reading of the statutes" which made him or her liable. Lush, J., 5 Q. B. D. 404.

Griffith's Indian Transfer of Property Act, 1882, p. 168, is as follows: "A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate but he must not commit any act which is destructive or permanently injurious thereto if the security is insufficient or will be rendered insufficient by such act." A security is insufficient unless the value of the mortgaged property exceeds by one-third or consisting of buildings by one-half the amount for the time being due upon the property.

The same authority, section 76, lays down the law that when during the continuance of the mortgage the mortgagee takes possession of the mortgaged property he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits charges of a public nature arrears of rent in default of which the property may be summarily sold and the interest on the principal money.

Independently of contract a lessee is guilty of waste who permanently injures house or land. The lessor has a right to have them kept unaltered and may protect such right by injunction.—*Spike* v. *Harding*, 7 Ch. Div. 871; *Doherty* v. *Allman*, 3 App. Cas. 709.

Waste may be committed of personal property by improperly changing the investments so as to imperil the capital though

the income of the Hindu widow be thereby increased.—*H. Dutt* v. *U. Dossee*, 6 Moore I. A. 433.

Where the property is in the possession of joint tenants as is usually the case with an undivided family property that waste which consists in the legitimate enjoyment of property will not be interfered with but when such waste is extravagant, destructive and against reason and conscience it may be restrained by an injunction.—*Job* v. *Potton*, L. R. 20 Eq. 84; *Bailey* v. *Hobson*, L. R. 5 Ch. 180. Partition is not always a satisfactory mode of remedy.

Where one tenant in common thinks proper by agreement with the other to hold the common property as occupying tenant and thereby excludes his co-tenant from all right of entry upon the land held in common an injunction will be granted to restrain him from dealing with the land otherwise than as an ordinary occupying tenant.—*Twort* v. *Twort*, 16 Ves. 128.

A railway company obtained a lease of land from five out of six co-tenants and laid down their railway thereon, the court refused to enjoin the sixth co-tenant from pulling up the rails.—*Durham Rail* v. *Wawn*, 3 Bea. 119.

Waste is spoil or destruction done or allowed to be done to houses, woods, lands, or other incorporeal hereditaments by the tenant thereof during the continuance of his tenancy. Waste is either voluntary or permissive, the former a matter of commission as by pulling down a house, the latter of omission only as by suffering it to fall by want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste. Therefore the removing wainscot, floors, or other thing once fixed to the freehold of a house is generally speaking waste: though it is held by way of exception to the ordinary rule that a particular tenant who has made erections for the purpose of trade or has put up ornamental fixtures may lawfully remove them. To cut down timber is waste. To convert wood, meadow or pasture into arable to turn arable meadow or pasture into woodland or turn arable or woodland into meadow or pasture is waste. And in general the commission of any act of this tendency is wrongful on the part of the tenant seised of any estate less than the inheritance.

One species of interest which is injured by waste is that of a person who has a right of common in the place wasted for example of pasturing cattle where the pasture is destroyed of taking water where it is allowed to escape of taking wood for repairs where the owner of the wood destroys the whole. See Griffith's Indian Easements Act.

(*o.*) Where the land is extensive and the trespassers numerous a temporary injunction is sometimes obtainable to prevent a multiplicity of suits. But the court is reluctant to cause suffering to the persons meanwhile in possession.—*Hanson* v. *Gardiner*, 7 Ves. 309; *Tenham* v. *Herbert*, 2 Atk. 483 (p) is an example of an injunction perpetual to prevent a multiplicity of suits.

The prevention of a multiplicity of suits is a principle which equity acts upon in cases of account, of agency, apportionment, general average, contribution, sureties, confusion of boundaries, rents and profits, waste and partnership.

A trespass may be under "colour of title" as when adjoining mines are worked so as to interfere the one with the other. The question in such cases is not one of abstract title but of the application of evidence to admitted rights but disputed boundaries, &c.—*Davenport* v. *Davenport*, 7 Hare 217; (r) see Griffith's Evidence Acts.

In practice such cases lead to two decrees, the one for a temporary injunction and ascertainment of rights, the other for a perpetual injunction and an account of profits and expenses.

(*p.*) A highway is a public easement over the land of the adjoining owner. See Griffith's Indian Easements Act VI. Waterpipes were without the consent of the landowner laid in the soil of the highway. He having no right to interfere with the easement and therefore being unable himself to interfere and remove the pipes was granted an injunction to prevent their continuance and the further laying.—*Goodson* v. *Richardson*, L. R. 9 Ch. 221.

A defendant entered the close possessed by the plaintiff and cut down a tree and threatened to cut down others. The police protected him in so doing but unfortunately for himself he had previously sued the plaintiff thus admitting his possession. The court granted a perpetual injunction.—*Stanford* v. *Hurlstone*,

L. R. 9 Ch. 116. Another defendant acted similarly with the view of preventing the operation of the statute of limitations but neglected to bring a suit to establish his title a perpetual injunction was granted against him.—*Lowndes* v. *Bettle*, 10 Jur. N. S. 226.

A temporary trespass by a wrong doer will not be enjoined for the trespasser may be turned off and the wrong amply remedied by damages.—*Cooper* v. *Crabtree*, 20 Ch. Div. 589. It is the repetition of the trespass or annoyance that alters the case.—*Coulson* v. *White*, 3 Atk. 21. So does the deliberate invasion of one man's property to commit a continuing trespass. So where destructive trespass is committed by quarrying or cutting down timber without a shadow of title.—*Talbot* v. *Hope Scott*, 4 K. & J. 113.—*Stanford* v. *Hurlstone*, L. R. 9 Ch. 116. So where irreparable injury is anticipated as by the removal of the stones of a seawall.—*Chalk* v. *Wyatt*, 3 Mer. 688; London & N. W. Rail., L. R. 4 Eq. 174. Where defendant was a pauper and vexatiously distrained upon tenants the landlord obtained an injunction.—*Hodgson* v. *Duck*, 2 Jur. N. S. 1014.

Sometimes a stranger acting in collusion with the tenant enters and commits waste. An injunction may be obtained on the ground of waste and the court will also unhesitatingly interfere on the ground of trespass.—*Courthope* v. *Mapplesden*, 10 Ves. 289; *Norway* v. *Rowe*, 19 Ves. 154.

As to rights of way, see Griffith's Easements Act, pp. 42, 55—60, 73.

The properties of two owners adjoin and abut upon a land or water highway each may use the highway to unload carts or ships though they overlap his neighbour's frontage.—*Original Co.* v. *Gibb*, 5 Ch. Div. 713.

To pollute a stream already useless and foul from other pollutions is neither an injury nor damage to do so on their cessation becomes both an injury and damage.—*Pennington* v. *Brinsof*, 5 Ch. Div. 772.

See note to (e).

To prevent an interference with the access of light and air the court will enjoin the finishing of a building which when carried up will obstruct ancient windows whether the house be

in the town or country.—*Robson* v. *Whittingham*, L. R. 1 Ch. 442; *Martin* v. *Headon*, L. R. 2 Eq. 425. The comfort or enjoyment of a man or his family in the occupation of his house is not seriously to be interfered with nor is he to be prevented carrying on his business with the same degree of convenience and advantage as before.—*Kelk* v. *Pearson*, L. R. 6 Ch. 809; *Aynsley* v. *Glover*, L. R. 10 Ch. 283. It depends upon the circumstances whether the court will grant a mandatory injunction or only give damages.—*Holland* v. *Worley*, 26 Ch. Div. 578, but see *Greenwood* v. *Hornsey*, 33 Ch. Div. 471. But the completion of the injury before the suit is no ground for refusing a remedy.—*Smith* v. *Smith*, L. R. 20 Eq. 500.

The plaintiff does not destroy his right by erecting buildings which interfere with his own light and air.—*Cannon* v. *Villars*, 8 Ch. Div. 415; nor because his business does not require more than a subdued light.—*Yates* v. *Jack*, L. R. 1 Ch. 295; nor will he be compelled necessarily to block up newly opened windows.—*Aynsley* v. *Glover*, L. R. 10 Ch. 283. The amount of obstruction is a question of fact in every case not of law.—*Parker* v. *First Avenue Hotel*, 24 Ch. Div. 283.

Easements of light vary so much with the facts of each case that one case depending on the evidence is not of great authority in another case. Griffith's Indian Easements Act.—*Bullers* v. *Dickinson*, 29 Ch. Div. 155. As to watercourses, see Griffith's Easements Act.—*Ballard* v. *Tomlinson*, 29 Ch. Div. 115; *Snow* v. *Whitehead*, 27 Ch. Div. 588; *Broder* v. *Saillard*, 2 Ch. Div. 692; *Hurdman* v. *North Eastern Ry. Co.*, 3 C. P. Div. 168.

(*r*.) As to the right of support, see Griffith's Indian Easements Act, pp. 53—54. It may be either an easement or a simple right of property.

The seller of land adjoining other land of his own under which are mines and minerals and who knows that at the time of sale the buyer is about to erect upon the land so purchased substantial buildings impliedly covenants that he will not use or permit the adjoining land to be used in such a manner as to derogate from his grant. A being such seller, B such buyer and C a lessee of the minerals from A and working them with danger to B. B obtained an injunction against both A and C.—*Siddons* v. *Short*, 2 C. P. Div. 572.

See *Davenport* v. *Davenport*, 7 Hare 217, cited in note to 54 (o). The owner of the garden of a London Square contracted with the tenants of the adjoining house to improve it. Under colour of the contract a person was allowed by the owner to enter and remove large quantities of gravel and soil. He was restrained by injunction obtained by the tenants.—*Allen* v. *Martin*, L. R. 20 Eq. 462. *Semble*, the injunction was due also on the ground of waste.

(*s.*) (*t.*) Nuisance *nocumentum* or annoyance signifies anything that worketh hurt, inconvenience or damage. And nuisances are of two kinds, public or common, nuisances which affect the public are an annoyance to all the Queen's subjects for which reason we must refer them to the class of public wrongs or crimes and private nuisances which may be defined anything done to the hurt or annoyance of the lands, tenements or hereditaments of another, and not amounting to a trespass.

First as to corporeal hereditaments. If a man builds his house so close to mine that his roof overhangs my roof and the water flows off his roof upon my roof this is a nuisance for which a suit will lie and an injunction may be obtained. Also if a person keeps hogs or other noisome animals so near the house of another previously built and inhabited that the stench of them incommodes him and makes the air unwholesome this is a nuisance as it tends to deprive him of the use and benefit of his house. Aldred's Case, 9 Rep. 58.—*R.* v. *White*, 1 Burr 337. A like injury is if one's neighbour sets up and exercises an offensive trade as a tanner's, a tallow chandler's or the like for though these are lawful and necessary trades yet they should be exercised in remote places and the rule is "Sic utere tuo ut alienum non lœdas"; this therefore is an actionable nuisance.—*Morley* v. *Pragnel*, Cro. Car. 510. But depriving one of a mere matter of pleasure as of a fine view by building a wall or the like this as it abridges nothing really convenient or necessary is no injury to the sufferer and is therefore not a nuisance which can be restrained by injunction. So far respecting houses. As to lands it is to be remarked that if one erects a smelting-house for lead so near the land of another that the vapour and smoke kills his corn and grass and damages his cattle therein this is a nuisance. 1 Roll. Abr. 89. And generally if one does any act in itself lawful which yet being done in that place necessarily

tends to the damage of another's land it is a nuisance for it is incumbent on him to find some other place to do that act where it will be less offensive. So also if my neighbour ought to scour a ditch and does not whereby my land is overflowed this may be restrained by injunction. F. N. B. 184. The principle of the law is the same as to incorporeal hereditaments. For it is a nuisance to stop or divert water that ought to run to another's meadow or mill. F. N. B. 184, and if a person has a right of way annexed to his estate across another's land and the latter obstructs the use of it, there is a nuisance. F. N. B. 183, which may be enjoined. The same principle applies to the right of a ferry and to the right to hold a fair. 2 Roll. Abr. 148, 140. But it is no nuisance to erect a mill so near to mine as to draw away the custom unless the miller also intercepts the water. Neither is it a nuisance to set up any trade or school in neighbourhood or rivalship with another; for by such emulation the public are like to be garners. And should the new mill or school occasion a damage to the old one it is damage without injury. Hale on F. N. B. 184.

That the removal of a nuisance will be very difficult is no justification but it is ground for suspending the enforcement of the injunction for a period.—*A. G.* v. *Colney Hatch*, L. R. 4 Ch. 146.

A person annoyed by a nuisance should be prompt in giving notice of his protest and do nothing to encourage it or his acquiescence will preclude his obtaining a remdy. But acquiescence in the erection of injurious buildings or of noxious works while they produce little damage will not deprive the person so acquiescing of his right to an injunction if the nuisance is increased and becomes productive of more serious damage.—*Cooper* v. *Hubbush*, 30 Bea. 160; *Goldsmid* v. *Tonbridge Wells*, L. R. 1 Ch. 349; *Bankart* v. *Houghton*, 27 Bea. 431; In *Tipping* v. *St. Helen's Smelting Co.*, L. R. 1 Ch. 66, one who purchased the land with knowledge of the nuisance was held not disentitled to relief. To obtain an injunction quia timet a strong probability of a future nuisance must be shown. A. G. 1893, 2 Ch. Div. 87.

Perpetual ringing of bells or performance of music though a source of pleasure to persons at a distance may be enjoined as

a nuisance to the immediate neighbours.—*Benjamin* v. *Storr*, L. R. 9 C. P. 400; *Friby* v. *Hobson*, 14 Ch. Div. 555.

The court will enjoin the fouling of a pure stream by emptying the contents of sewers, dye houses and manufactories therein or by taking away water when sewage is already poured therein.—*A. G.* v. *Bradford Canal*, L. R. 2 Eq. 71. It will also enjoin the burning of bricks, the erection of coke ovens, the densely smoking of chimneys and the carrying on of any trade so as seriously and materially to interfere with the ordinary comfort and enjoyment of a neighbouring house or to interfere with and injure the vegetation of neighbouring fields. 4 D. & Sm. 321.—*Imperial Gas Co.* v. *Broadbent*, 7 H. L. C. 600. The Gas Light and Coke Co., 15 Q. B. D. 1, shows that the use of heavy steam rollers so heavy as to break gas pipes properly laid will be enjoined. But the law does not concern itself about trifles.—*Goldsmid* v. *T. W. Commissioners*, 1 Ch. Div. 349; *Fletcher* v. *Bealey*, 28 Ch. Div. 688. Broom's Maxims, Ch. III, s. II. The mode of administering justice. The same principle applies to running water. Every riparian proprietor has naturally an equal right to the use of the water flowing adjacent to his land. But the diversion of an amount so trifling as not to produce pecuniary damage will not be cause for a suit save when a right may be acquired thereby which would prejudice the plaintiff's right.—*Wilts & Berks Canal Co.* v. *Swindon Waterworks*, L. R. 7 H. L. 697. Griffith's Indian Easements Act, p. 28. The principle however does not apply to an injury to real property.—*Pindar* v. *Wadsworth*, 2 East. 154.

Though a public nuisance be a penal offence it may also be enjoined by suit to the civil court.—*A. G.* v. *Shrewsbury Bridge Co*, 21 Ch. Div. 752; *A. G.* v. *Corkermouth Board*, L. R. 18 Eq. 172. But the legal right must be clear.—*Broadbent* v. *Imperial Gas Co.*, 7 D. M. & G. 436. An act of the legislature may authorise what would otherwise be a nuisance.—*Truman* v. *London*, 29 Ch. Div. 89.

The apprehended repetition of a nuisance from public shows, sports and exhibitions may be enjoined.—*Philips* v. *Thomas*, 6 T. L. R. 327.

Every common trespass is not a foundation for an injunction where it is only contingent, fugitive or temporary; but if it is continued so long as to become a nuisance it ought to be enjoin-

ed.—*Gaunt* v. *Fynney*, L. R. 8 Ch. 8. In the cases of nuisances the operation of the decree is usually postponed so that the defendant may remove it without doing unnecessary damage.

From the earliest period injunctions have been granted to restrain the owner of land from so dealing with his property as to prejudice or destroy the rights of his neighbour thereby enforcing the maxim sic utere tuo ut alienum non lœdas. Broom.

The foundation of the jurisdiction is the head of mischief alluded to by Hardwicke, L.C., that sort of material injury to the comfort and enjoyment of property which requires the application of a power to prevent as well as to remedy an evil for which damages more or less would be given in a suit.—*A. G.* v. *Nichol*, 16 Ves. 342. The plaintiff must be prepared to prove substantial damages sustained or anticipated. The court will not interfere to protect a dry strict legal title.—*Dent* v. *Auction Mart Co.*, L. R. 2 Eq. 238; *Lingwood* v. *Stowmarket Paper Co.*, L. R. 1 Eq. 77.

(*u.*) By a patent right we are to understand a privilege granted by the crown to the first inventor of any new contrivance in the manufactures that he alone shall be entitled during a limited period to make articles according to his own invention. It is so called because the instrument by which it is bestowed is in England in the form of letters patent under the great seal which is the established mode of royal grant. To confer on any individual the exclusive right of carrying on a particular trade or manufacture is in general beyond the lawful bounds of the royal prerogative. It amounted at common law to a species of offence called a monopoly; and it is declared by the statute of monopolies, 21 Ja. I c. 3 to be altogether "contrary to the laws of this realm." But an exception was always made in favour of new inventors to whom it was held that the crown might lawfully concede for a reasonable period a privilege of this description because such grants whilst they tended to encourage useful ingenuity encroached on no right of which others were already in possession. In accordance with which principle the statute of James also excepts from its general declaration against monopolies all letters patent for the term of 14 years or under by which the privilege of sole working or making any new manu-

factories within this realm which others at the time of granting the letters patent shall not use shall be granted to the true and first inventor thereof so as they be not contrary to law nor mischievous to the State nor to the hurt of trade nor generally inconvenient.

As to the method by which the inventor of a new manufacture may after filing a specification obtain the grant of exclusive privilege to make it (commonly called Letters Patent) see Act XV of 1859, ss. 1—21. Section 1 of the said Act includes new patterns and designs in the meaning of the word manufacture. Section 37A defines the effect of exclusive right in the United Kingdom to patterns and designs. Sections 22—35 contain special rules for suits concerning the infringement, annulment and fraudulent obtaining of patents—See also Griffith's Civil Procedure Code, 1882—1888. The period of limitation for a suit for compensation for the infringement of a copyright or other exclusive privilege is three years from the date of the infringement. *Semble*, this period extends to suits for an account of the profits obtained by the infringement. I. L. R. 3 C. S. 17. Suits for compensation are not cognizable by the Presidency Small Cause Courts.

Act XV of 1882, s. 19n, Griffith's Civil Procedure Code, p. 422. The effect in India of letters patent obtained in the United Kingdom is regulated by section 20 of Act XV of 1859.

In *Bells* v. *Neilson*, L. R. 5 H. L. 1, it was held that if an agent does anything which infringes a patent he is liable though only an agent. If the owner of a ship causes patent pumps to be inserted in the ship the captain is bailee thereof. The exclusive right granted is to make use vend and exercise the invention. Though the captain use other pumps instead he still seems to use the invention by having patented pumps on board. At any rate he may be sued apart from the owner.—*O. A. Adavi* v. *Young*, 12 Ch. Div. 13. Where a patent has been granted in England for a new process for producing more cheaply a chemical product which was previously known the importation and sale in England of this article made abroad is an infringement.—*Van-Heyden* v. *Nenstadt*, 14 Ch. Div. 230. The same principle would apply to Indian patents. The exclusive right to use the patent does not bind the owner to make compensation if it uses the process.—*Dixon* v. *London Small*

Arms Co., 1 App. Cas. 632; *Feather* v. *Q.*, 6 B. & S. 257. Yet though servants or agents of the crown doing its work are not liable for an infringement of the patent private contractors with the crown to manufacture a patented article are not protected by the crown's privilege. S. C.

The form of an English Patent is as follows: "Victoria by the grace of God of the United Kingdom of Great Britain and Ireland, Queen Defender of the Faith. To all to whom these presents shall come greeting." [Here follow recitals that the grantee has declared himself the true and first inventor that he has described the nature of the invention, &c.] "know ye therefore that We of our especial grace certain knowledge and mere motion do by these presents for us our heirs and successors give and grant unto the said patentee our especial license full power sole privilege and authority that the said patentee by himself his agents or licensees and no others may at all times hereafter during the term of years herein mentioned *make use and exercise* the said invention and *vend* the said invention within our United Kingdom of Great Britain and Ireland and Isle of Man in such manner as to him or them shall seem meet and that the said patentee shall have and enjoy the whole profit and advantage from time to time accruing by reason of the said invention during the term of fourteen years from the date hereunder written of these presents." [Here follow a prohibition of infringement and conditions that the invention is new and the grant legal and that the fees be paid article manufactured and sold at reasonable price, &c.]

The person who has discovered the main and leading idea remains the true and first inventor and as such entitled to apply for a patent notwithstanding that he avails himself of the assistance and suggestions of workmen and servants in bringing his invention to a state of perfection.—*Allen* v. *Rawson*, 1 C. B. 551; *David* v. *Woodley*, 1884, No. 13876, Griff. L'O. C. 26.

Inventions for which letters patent have been upheld may in respect of the subject-matter be classified as follows:

(1) New contrivances applied to new objects or purposes.

(2) New contrivances applied to old objects or purposes.

(3) New combinations of new or partly of new and partly old

parts which result in the production of a material object or process.

(4) New methods involving the exercise of invention, of applying old things.

(5) The application with ingenuity of materials previously unapplied to any useful purpose to some one or more specific useful purpose or purposes.

(6) Chemical processes.

Our space does not allow us to treat at length of this somewhat meagre statement. But we cannot refrain from expressing our regret that the English and Indian Governments are behind that of the United States whose officers make suggestions to the patentee which sometimes nay often are of great value in improving the utility of the invention.

In applications for an interlocutory or temporary injunction a presumption of its validity must be established by long active uninterrupted enjoyment, or by previous decisions in its favour. —*Bovill* v. *Goodier*, L. R. 2 Eq. 195; *Davenport* v. *Richard*, 3 L. T. N. S. 503; *Whitten* v. *Jennings*, 6 Jur. N. S. 164. The practice on granting a temporary injunction is to require the parties respectively to give an indemnity and keep an account, on refusal to require the defendant to keep an account. Should it be shown that the defendant is unable to be answerable in damages, the injunction will be more readily granted.—*Plimpton* v. *Spiller*, L. R. 4 Ch. Div. 286. But a retrospective account is not always granted with a temporary injunction though it is with a perpetual one. But an account of all moneys "received or to be received" may be ordered or an account of the articles only.—*Vidi* v. *Smith*, 3 E. & B. 969; *Plimpton* v. *Spiller*, 4 Ch. Div. 280; *Russell* v. *Cowly*, 1 C. M. & R. 864; *Hill* v. *Thompson*, 3 Mer. 626. An interim injunction is sometimes granted on the ground that if the defendant continues to sell the plaintiff may be driven into a multiplicity of suits against the buyers.—*Plimpton* v. *Spiller*, 4 Ch. Div. 286.

A plaintiff though successful in a suit for an infringement may be refused an injunction where the defendant had infringed unknowingly at once on being requested gave full information and promised to sell no more.—*Upman* v. *Elkan*, L. R. 12 Eq. 145; *Thomson* v. *Baker*, 3 T. R. 715. On the other hand where

a party shows a decided intention to infringe the perpetual injunction may be obtained before infringement.—*Frearson* v. *Low*, 9 Ch. Div. 48.

It is not a breach of the injunction for the person against whom it has been ordered to publish advertisements asking for subscriptions towards the expense of an appeal.—*Plating Co.* v. *Farquharson*, 17 Ch. Div. 49. The mere making using or selling the elements or parts which afterwards enter into a patent in combination is not enjoined unless the parts as in a knife can readily be put together.—*Townsend* v. *Haworth*, 12 Ch. Div. 831; *United Telephone Co.* v. *Dale*, 25 Ch. Div. 782.

Under the English Patents Act, 1883, an injunction was granted to restrain the defendant company from threatening the plaintiffs their customers or any other person or persons with legal proceedings or liability in respect of certain alleged infringements of patents claimed to have been assigned to the defendants.—*Kensington Electric Lighting Co.* v. *The Lane Fox Electrical Co.*, 1891, April 24th. The defendants were not owners of the patent.

Equity usually assumes the validity of a patent.—*Halsey* v. *Brotherhood*, 15 Ch. Div. 514; 19 Ch. Div. 386.

Groundless threats of legal proceedings to restrain an infringement of a patent may in England be enjoined under the Patents Designs and Tradesmarks Act, 1883, s. 32. The Indian Patents Act XV of 1859 does not seem to provide for such a case, but possibly the court might grant similar relief on the principles of bills of peace and quia timet.(1) Fenner 1893; 2 Ch. 656; Mackin, 9 R. P. C. 465.

(*v.*) Copyright is the exclusive right which the law allows an author of printing and reprinting his original work. Justinian's laws according to Sir William Blackstone do not recognize such right of property though the sale of literary works for the purposes of recital or multiplication is certainly as ancient as the times of Terence (Prolog. in Eunuch 20) and Martial 167, IV. 72. In *Donaldson* v. *Becket*, 2 Bro. P. C. 145, a majority of the judges declared that at common law an author did possess the sole right not only of first publishing but of afterwards re-pub-

(1) As to new patterns and designs, see Act XIII of 1872.

lishing his own works and that it belonged to him and his assigns in perpetuity. In the reign of Queen Anne the right of the author and his assigns to the sole liberty of printing and reprinting the book was restricted to 14 years in analogy to patent rights under the statute of monopolies. This period is greatly extended by 5 & 6 Vict. c. 45 which provides that the copyright of every book (under which word is included in the construction of the act "every volume, part or division of a volume, pamphlet, sheet of letter press, sheet of music, map, chart or plan separately published") which shall be published in the lifetime of its author shall endure for his natural life and for 7 years longer or if the 7 years shall expire before the end of 42 years from the first publication shall endure for such period of 42 years. When the work is posthumous it is to endure for 42 years from the first publication and to belong to the proprietor of the author's manuscript.

Act XX of 1847 after reciting that doubts existed as to the enforcing the common law right of copyright in India and as to the extent of the jurisdiction under 5 & 6 Victoria c. 45, proceeds to define and provide for the enforcement in India of the right called copyright.

Piracy is an infringement of copyright. Its leading and distinguishing feature is that it reproduces the pirated work in such a manner as to interfere with the profit and enjoyment which the proprietor derives from it. Yet everything that does this by no means exposes the person so acting to the charge. An abridgment of a book may diminish the profits, but is not illegal nor to be enjoined. Quotations and extracts made in good faith and the use of the same common materials in another work are not infringements.—*Wilkins* v. *Acken*, 17 Ves. 426. But abridgments are not favoured by the law.—*Chatterton* v. *Cave*, L. R. 10 C. P. 572.

Several persons may obtain copies of judgments pronounced in court and publish them but the evidence on which they are founded should be fairly stated.

Part of a book may be pirated and if such part cannot be separated from the rest the whole will be enjoined. In making directories an evasive imitation of another book will be enjoined.—*Weldon* v. *Dicks*, 10 Ch. Div. 241. *Semble*, the grant by

the author of copyright in one edition does not prevent him bringing out a new edition before sale of the first.—*Warne* v. *Routledge*, L. R. 18 Eq. 497. Copyright in a translation may exist.—*Wyatt* v. *Barnard*, 3 V. & B. 77.

If a report of a judge's judgment or summing up to a jury does not in fact give reasonable opportunities to the reader to form his own judgment as to what conclusion should be drawn from the evidence given, the publication of such partial and in that respect inaccurate representations of the evidence may be the subject of a suit for a libel to which the supposed privilege in what was said by a judge would be no answer. There is no presumption one way or the other as to whether a judge's judgment does or does not give such a complete and substantially accurate account of the matters upon which he is adjudicating as to bring it within the privilege. If it be so it must be proved to be so by evidence and certainly not inferred as a presumption of law. Halsbury, L.C.—*Macdougall* v. *Knight*, 14 App. Cas. 194; 5 T. L. R. 90 H. L. E. Respecting presumptions of fact and law, see Griffith's Indian Evidence Acts.

Upon grounds of irreparable mischief or of the inadequacy of the remedy by damages or the prevention of multiplicity of suits injunctions have been granted in a class of cases bearing a close analogy to that of copyrights, namely unpublished manuscripts. In cases of literary, scientific and professional treatises in manuscript it is obvious that the author must be deemed to possess the original ownership and be entitled to appropriate them to such uses as he pleases. Nor can he justly be deemed to intend to part with that ownership by depositing them in the possession of a third person or by allowing a third person to take and hold a copy of them. Such acts must be deemed strictly limited in point of right use and effect to the very occasions expressed or implied, and ought not to be construed or implied to be a general gift or authority for any purposes of profit or publication to which the receiver may choose to devote them. The property then in such manuscripts not having been parted with in cases of this sort if any attempt is made to publish them without the consent of the author or proprietor it is plain that he ought to be protected by the courts.—*Prince Albert* v. *Strange*, 1 Mac. & Gor. 25.

And accordingly the course of granting injunctions has been constantly acted upon in courts of equity.—*Southey* v. *Sherwood*, 2 Mer. 434; *Pope* v. *Curl*, 2 Atk. 342, and has been applied to all sorts of literary composition. But on principles allied to the rights of private individuals to whom letters are addressed by their agents it may be the right and even the duty of Government to publish historical, military or diplomatic information even against the will of the writers.

The publication of a dramatic piece or musical composition as a book before it is dramatically represented or performed does not deprive the author of the exclusive right of representing or performing it.—*Chappell* v. *Boosey*, 21 Ch. Div. 232.

Where a lecture is delivered to an audience limited and admitted by tickets the understanding is that whether previous to the delivery the lecture was committed to writing or not the audience may take the fullest notes for their own personal purpose but they are not at liberty to use them afterwards for the purpose of publishing the lecture for a profit and the publication in shorthand characters is not different in any material sense from any other and may be restrained by injunction.—*Nicols* v. *Pitman*, 26 Ch. Div. 374.

A mining engineer K made a report upon a mining property and handed it to a person engaged with a syndicate in bringing out a company. It was agreed between them that the report might be printed and shown to the syndicate and if they determined to proceed to the formation of a company and published the report K was to be paid £1000 for it, but if the company was not proceeded with the report was to be returned to him. Some 100 copies of the report were printed and shown to the syndicate. Copies were given to some of the members of the syndicate and to one or two other persons. The proposed company having been abandoned the defendant company took up the property and having obtained a copy of the report made use of it in the prospectus issued by them. *Held*, that K was entitled to an injunction against the company to restrain them from publishing the report which remained his property and also to an inquiry as to damages.—*Kenrick* v. *Danube Collieries and Minerals Co.*, 39 W. R. 473.

The novel "Little Lord Fauntleroy" was dramatized. An

injunction was granted enjoining the defendant from multiplying copies containing any passages from the novel and ordering passages in four copies already made three being for the performers to be cancelled.—*Warne & Co.* v. *Seebohm*, 39 Ch. Div. 73.

A student was enjoined from publishing university lectures. —*Cavid* v. *Sime*, 12 App. Cas. 326.

The plaintiffs entered into a written contract with the defendant in Berlin that he should make copies of a picture of which he held the unregistered copyright. The defendant made the copies required but in addition made copies for himself which he sent to England and undersold the plaintiffs. The plaintiffs then registered their copyright. *Held*, that they were entitled to penalties under the Copyright Act by way of damages for copies sold after registration. *Held* also that they were entitled to an injunction and *semble* to damages for breach of an implied condition in contract not to reproduce more than the specified number of copies.—*Tink* v. *Priester*, 19 Q. B. D. 629. Cf. *Troilzch* v. *Rees*, W. R. 1887, 150.

(*w.*) The definition of trade mark given by the Registration Act of 1875 has been enlarged by the Patent Acts of 1883 and 1888 and is as follows:

(1) For the purposes of this Act a trade mark must consist of or contain at least one of the following essential particulars:—

(*a*) A name of an individual or firm printed, impressed or woven in some particular or distinctive manner; or

(*b*) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or

(*c*) A distinctive device mark brand heading label or ticket; or

(*d*) An invented word or invented words; or

(*e*) A word or words having no reference to the character or quality of the goods, and not being a geographical name.

(2) There may be added to any one or more of the essential particulars mentioned in this section any letters, words or figures or combination of any letters, words or figures or of any of them;

but the applicant for registration of such additional matter must state in his application the essential particulars of the trade mark and must disclaim in his application any right to the exclusive use of the added matter and a copy of the statement and disclaimer shall be entered on the register.

(3) Provided as follows:

I. "A person need not under this section disclaim his own name or the foreign equivalent thereof or his place of business but no entry of such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof.

II. Any distinctive word or words, letter, figure or combination of letters or figures or of letters and figures used as a trade mark before 13th August 1875, may be registered as a trade mark." Patents, Designs and Trade Marks, 1888, s. 10.

Application for registration of a trade mark is deemed to be equivalent to public use of the trade mark, s. 17.

Trade and Property marks are thus defined by the Penal Code, ss. 478, 479. "A mark used for denoting that goods have been made are manufactured by a particular person or at a particular time or place or that they are of a particular quality is called a trade mark."

"A mark used for denoting that moveable property belongs to a particular person is called a property mark." Using a false trade or property mark and counterfeiting a genuine one are penal offences, ss. 480—489.

Injunctions will issue where a criminal charge could not be maintained for on such a charge it is necessary to prove not only that the mark would produce a false belief but that it was used with that intention.

Where an existing trade mark is imitated it is not necessary that the resemblance should be such as would deceive persons who should see the two marks placed side by side.—*Seixo* v. *Provezende*, L. R. 1 Ch. 196; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508.

Act VIII of 1878, s. 18 g, prohibits the importation of goods with false trade marks. Suits for compensation for infringement of trade marks are not cognizable by Presidency Small

Cause Courts, Act XV of 1882, s. 19 n, Griffith's Civil Procedure Code, p. 422.

The law of trade marks was developed by the equity courts before any legislation on the matter. Its history is sketched by Lord Blackburn in *Singer Manufacturing Co.* v *Long*, 8 App. Cas. 29.

The remedy by injunction is not barred by a lapse of time which would not bar the legal right.—*Fullwood* v. *Fullwood*, 9 Ch. Div. 176.

The proprietor of a house or estate may give it the same name as that used by a neighbour without committing a legal injury.—*Day* v. *Brounrigg*, 10 Ch. Div. 294.

The principle of the law of trade marks extends to the sale of the goodwill of a shop. The seller will be enjoined from carrying on his business so as to induce the public to believe that he is continuing his former one; and from soliciting old customers or otherwise inducing them to deal with him.—*Crutwell* v. *Lye*, 17 Ves. 335; *Leggott* v. *Barrett*, 15 Ch. Div. 306.

A sale of a goodwill and business gives the right to exclusively use an old partnership name.—*Levy* v. *Walker*, 10 Ch. Div. 448. Goodwill means every positive advantage as contrasted with the negative advantage of the late owner not carrying on the business himself whether connected with the premises or not with the name of the late firm or with any other matter carrying with it the benefit of the business.—*Churton* v. *Douglas Johns*, 174; *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456.

Trade marks have been likened to both letters patent and to copyright "from both of which they differ in many respects."—*Johnstone* v. *Orr Ewing*, 7 App. Cas. 219. The broad difference between the former and the two latter is that the public are at liberty to manufacture the article marked, but not the one patented or protected by the copyright. But though at liberty to manufacture a person must not while so doing or afterwards use another's trade mark.—*Davenport* v. *Rylands*, L. R. 1 Eq. 302.

A company may be enjoined from obtaining registration with the same name as another company or one similar thereto.

Griffith's Indian Companies Act.—*Madame Tussaud & Sons* v. *Tussaud*, 44 Ch. Div. 678.

Where marks were used previously to A.D. 1887 with a fraudulent addition implying that the goods were made at H, when they were in fact made at M, the court refused an application to register the advices without the addition. Fuente's Trade marks, 1891, W. N. 39.

In an invoice delivered with beer the casks were described as barrels. One cask contained less than a barrel of beer, should contain, *viz.*, 34 instead of 36 gallons. *Held*, that the description was not the less applied to the cask within the meaning of the English Act of 1887, because the invoice was not physically attached thereto.—*Budd* v. *Lucas*, 1891, 1 Q. B. 408.

The use abroad of a misleading trademark was enjoined in *Orr* v. *Johnston*, 13 Ch. Div. 434.

(*x*.) Whether there is or is not property in a trade name it is a fraud on the part of one person to attract to himself the custom intended for another by a false representation direct or indirect that the business carried on by himself is identical with that of the other person by whose ability and exertions the name has acquired the reputation it possesses.—*Lee* v. *Haley*, L. R. 5 Ch. 155. An act originally innocent may become fraudulent.—*Goodfellow* v. *Prince*, 35 Ch. Div. 9. But deception must be made out. S. C.

It is illegal for an incorporated company to imitate the name of another to the detriment of the other. Griffith's Indian Companies Act, 1882, s. 42.

An ironmonger's assistant named Day and a general shopkeeper named Martin were enjoined from carrying on the business of blacking manufacturers under the celebrated name of Day and Martin though they were left free to trade as Martin and Day.—*Clayton* v. *Day*, 76 L. T. Journal 79.

The names of hotels are also protected by injunction. An author is entitled to the sole use of a name whether his own or assumed which sells his works for him.—*Byron* v. *Johnston*, 2 Mer. 29. A painter is entitled to restrain the exhibition under his name of a picture which he has not painted.—*Martin* v. *Wright*, 6 Sim. 297. In *Clark* v. *Freeman*, a physician was

refused such protection in respect of a quack medicine. 11 Bea. 112, but the case has been questioned. Cairns, L. J. —*Maxwell* v. *Hogg*, L. R. 2 Ch. 307.

In *Routh* v. *Webster*, 10 Bea. 561, the promoters of a new joint stock company were restrained from using the plaintiff's name in their prospectus as a trustee of the company for they were not entitled said the judge to use the name of any person they pleased representing him as responsible in their speculations and to involve him in all sorts of liabilities and then to be allowed to escape the consequences by saying they had done it by inadvertence. The decision was approved by Cairns, L.C., in *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142.

Where the owner of a publication claims an injunction to restrain the issue of another publication with a similar name he must show not only that the assumption of the name by the defendant is likely to deceive the public but also that there is a probability that the plaintiff will be injured by such deception.—*Borthwick* v. *The Evening Post*, C. A. 37, Ch. Div. 449.

(*y*.) There is no distinction made between private letters possessing the character of literary compositions and those whose very nature imports as matter of business or friendship or advice or family or personal confidence the implied or necessary intention of privacy and secrecy. For the purposes of public justice publicly administered according to the established jurisdiction of the country in the ordinary modes of proceeding private letters may be required to be produced and published. But it by no means follows that private persons have the right to make such publications on other occasions upon their own notion of taking the administration of justice into their own hands or for the purpose of vindicating their own conduct or of gratifying their own enmity or of indulging a gross and diseased public curiosity by the circulation of private anecdotes or family secrets or personal concerns. Yet the courts have not enjoined any publication which purports to be a literary work upon the mere ground that it is of a libellous character and tends to the degradation or injury of the reputation or business of the plaintiff who seeks an injunction against the publication.—*Clark* v. *Freeman*, 11 Bea. 112.

Lord Eldon based the injunction not upon the feelings of the

writer and pain caused thereto but upon a mere civil right of property. That right of property may be qualified in some respects. By sending a letter the writer gives for the purpose of reading it and in some cases of keeping it a property to the person to whom the letter is addressed; yet the gift is so limited that beyond the purposes for which the letter is sent the property is in the sender. Under such circumstances it is immaterial whether the intended publication is for the purpose of profit or not. If for profit the party is then selling if not for profit he is then giving that a portion of which belongs to the writer.—*Gee* v. *Pritchard*, 2 Swanstone 413; *Pope* v. *Curl*, 2 Atk. 342; *Lord Percival* v. *Phipps*, 2 *Ves. & Beam.* 19; *Thompson* v. *Stanhope Ambler* 739.

The property in and the right to retain letters remains in the person to whom they are sent. But the sender has still that kind of interest if not property in the letters which enables him to restrain their publication unless it can be clearly shown that such publication is necessary for vindication of character.—*Earl of Lytton* v. *Devey*, 54 L. J. Ch. 293. The publication was enjoined.

(*z*.) In *Brampton* v. *Beddowes*, 13 C. B. 538 the defendant had accepted in the forbidden district while collecting debts orders for goods. In *Rogers* v. *Drury*, W. N. 1887, p. 217. After the sale of a medical practice the former practitioner was held to have broken his covenant when some patients residing within the district called him in and he attended them there. He had not solicited their custom. In *Llewellyn* v. *Simpson*, 1891-4 an action between two solicitors the defendant had covenanted with the plaintiff "that the said S shall not at any time or times hereafter directly or indirectly either in his own name or in the name or names of or jointly with any other person or persons and either with or without fee or reward use exercise practice or carry on the business or profession of a solicitor or conveyancer of the supreme Court of Judicature at or in the towns of T or B without the licence or consent of the said L and his co-partner first had and obtained. The defendant had set up in business outside the limits of the forbidden district and the acts which were complained of were the following:—(1) Acting for clients residing within the district; (2) having

professional interviews with such clients within the district; (3) attending auctions within the district as solicitor for the vendors; (4) advertising for the creditors of deceased persons who had resided within the district; (5) conducting civil and criminal cases in courts held therein. Romer, J., *held* that (1) and (4) did not constitute breaches of the contract that (2), (3) and (5) did; but that (5) being admitted to be a breach an injunction should be granted without discussing (2) and (3) minutely.

The clerk of a solicitor commencing a practice on his own account will not be enjoined from acting against parties clients of his late master unless it be shown that when clerk he acquired special and particular information which it would be a breach of good faith to carry into the service of the opposite parties.—*Brieheno* v. *Thorp*, Jac. 300. In *Hardy* v. *Veasey*, L. R. 3 Ex. 107 an action by a customer against his banker for disclosing the state of the customer's account without justifiable cause the question was left to the jury whether under the circumstances it was reasonable and proper to make the disclosure. *Held*, that assuming the existence of a legal duty on the banker not disclose the customer's account the direction was right. But the question of the exact nature of the duty was not settled it being left open whether special damage was essential to the maintenance of the action.

Mandatory injunctions.

55. When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

The court will not compel a lessee to carry on the business of an innkeeper but it will enjoin him from doing such acts as will put it out of his power or the power of any other person to continue it.—*Hooper* v. *Broderick*, 9 L. J. Ch. N. S. 321.

Lamb v. *North London Railway*, L. R. 4 Eq. 174 shows that where a company with compulsory powers to take land attempts

to extend them beyond the express words or absolutely necessary implication of their act they will be enjoined.

The doctrine of *Tulk* v. *Moxay*, see note to s. 23, has not been extended from restrictive covenants to those which are affirmative.—*Haywood* v. *Brunswick*, 8 Q. B. D. 403; *London & S. W. Ry. Co.* v. *Gomm*, 20 Ch. Div. 562. In cases of tort this kind of injunction has long been of frequent occurrence.—*Thorley* v. *Massam*, 14 Ch. Div. 784; *Thomas* v. *Williams*, 14 Ch. D. 864.

Tulk v. *Moxay* is an application of the principle "assignatus utitier jure auctoris" which may be rendered "a person cannot transfer to another a right which he does not possess." Justinian, D., 50, 17, 54. Bills of exchange form an exception to the principle.

In cases of contract the breach independently of damages may justify an injunction in cases of nuisance the substantiality of the damages is the question for judicial consideration.—*A. G.* v. *Mid. Kent Ry.*, L. R. 3 Ch. 104. A plaintiff by negotiating for a specific sum may show that he regards money as an adequate compensation.—*Senior* v. *Pawson*, L. R. 3 Eq. 334. Where both remedies are open to the court, the circumstances of the case will have great influence.—*City Co.* v. *Tennant*, L. R. 9 Ch. 218; *Gaskin* v. *Ball*, 13 Ch. Div. 329. But in many cases a mandatory injunction to undo the injurious acts is the only adequate remedy. Notwithstanding repeated warnings the defendant had persisted in building over a court-yard giving access to plaintiff's premises. The plaintiff though he had offered terms of compensation obtained an injunction for the destruction of the buildings.—*Krehl* v. *Burrell*, 11 Ch. Div. 146. Daniel 1891, 2 Ch. Div. 27. A wall interfering with light was ordered to be pulled down in Shiel, W. R. 93, 115. The relief will be extended to buildings erected after the commencement of the action or after the notice.—*Smith* v. *Day*, 13 Ch. Div. 651.

Before a court will in the case of co-sharers make an order that a portion of the joint property alleged to have been dealt with by one of the co-sharers without the consent of the other should be restored to its former condition (as for instance where a tank has been excavated) a plaintiff must show that by the act which he complains of he has sustained some injury which materially affects his position. The fact that a portion of the

land on which a tank had been excavated by the defendant was fit for cultivation does not constitute an injury of a substantial nature such as would justify an order under the section.—*Joy* v. *Bippro*, I. L. R. 14 C. S. 236.

A mandatory injunction was granted against a sub-manager where it was impossible to serve either the principal or his manager.—*Cohen* v. *Poland*, W. N., 1887, 159.

Illustrations.

(*a.*) A, by new buildings, obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act, Part IV. B may obtain an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstructs B's lights.

(*b.*) A builds a house with eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project.

(*c.*) In the case put as illustration (*i*) to Section 54, the Court may also order all written communications made by B, as patient, to A, as medical adviser, to be destroyed.

(*d.*) In the case put as illustration (*y*) to Section 54, the Court may also order A's letters to be destroyed.

(*e.*) A threatens to publish statements concerning B which would be punishable under Chapter XXI of the Indian Penal Code. The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B's property.

(*f.*) A, being B's medical adviser, threatens to publish B's written communications with him, showing that B has led an immoral life. B may obtain an injunction to restrain the publication.

(*g.*) In the cases put as illustrations (*v*) and (*w*) to Section 54 and as illustrations (*e*) and (*f*) to this section, the Court may also order the copies produced by piracy, and the trade-marks, statements, and communications therein respectively mentioned, to be given up or destroyed.

Payment of money into court by way of damages is an admission of having done wrong. And to complete the building

after such payment is rendered more inequitable.—*Lawrence* v. *Horton*, 59 L. J. Ch. 440. Cf. *Daniel* v. *Ferguson*, C. A., 1891, Ch. 27.

An article had been published by the defendant as proprietor of a financial newspaper called the "Financial Observer" and "Mining Herald" reflecting in strong terms on the character and honesty of the plaintiff. The article first appeared on February 1, 1891, and was frequently repeated. In an action for libel thereon and before the trial the plaintiffs obtained an interlocutory injunction. The court of appeal unanimously held that the courts of first instance had jurisdiction to grant such injunction but Kay, L. J., dissenting that it had been wrongly exercised in this case; and that it is wiser in all but exceptional cases to abstain from any interference with the freedom of publication; and that an interlocutory injunction ought not to be granted where if the alleged libel be true the publication is for the public interest and interference with its circulation would be an infringement with the liberty of the press in that it might fetter the freedom of speech.—*Bonnard* v. *Perryman*, 21st April 1891.

This case may be taken to modify several recent cases which preceded it and rested the injunction on the ground of damage to property. See 14 Ch. Div. 784, 864; 3 C. P. D. 339.

A shareholder of a company issued a circular to other shareholders imputing fraud in getting up the company and proposing certain steps to be taken. The plaintiff not showing falsehood or malice in the circular and there being no intention further to distribute and the mischief if any having been already done the court of appeal dissolved a temporary injunction.—*Quartz Hill Co.* v. *Beall*, 20 Ch. Div. 501; *Liverpool Household Stores* v. *Smith*, 37 Ch. Div. 170; 57 L. J. Ch. 85, is in its reasoning on many points similar to *Bonnard* v. *Perryman*.

See note to section 7.

Injunction when refused.

56. An injunction cannot be granted—

(*a*) to stay a judicial proceeding pending at the institution of the suit in which the injunction is

sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

An injunction against execution does not make the execution a "pending" proceeding. Appen. 14 M. S. 425.

(*b*) to stay proceedings in a Court not subordinate to that from which the injunction is sought;

As to arbitrations, see *London & B. Railway* v. *Cross*, cited in note to s. 30 *j*. The Court cannot restrain an arbitration even though the matter be outside the arbitration agreement. Wood, 61 L. J. Ch. 158.

(*c*) to restrain persons from applying to any legislative body;

See Griffith's Institutes, p. 252.

Though the use of the funds of a company have been restrained so as to prevent an appeal to the legislature the principle still obtains.—*Hawkes* v. *E. C. Ry.*, 1 D. M. & G. 737; *L. R. Co.* v. *N. W. Ry.*, 2 K. & J. 293; E. P. Hartridge, L. R. 5 Ch. 671.

(*d*) to interfere with the public duties of any department of the Government of India or the Local Government, or with the sovereign acts of a Foreign Government;

Articles made in Germany were brought into England and stopped as an infringement of an English patent. The sovereign of Japan the Mikado claimed them as his property. The court ordered them to be delivered to him.—*Vavaseur* v. *Krupp*, 9 Ch. Div. 351. The right to regulate the coinage and issue of notes for the payment of money as part of the circulating medium is part of the sovereign prerogative recognised by the law of nations. The law of nations is part of the common law of England—See Griffith's International Law—And money being the medium of commerce a foreign sovereign in amity with England will have his right to issue such notes protected by injunction. The notes were manufactured by exiles who intended to invade Hungary and use the notes there. But the court of appeal refused to enjoin the use in England of the royal arms

of Hungary.—*Emperor of Austria* v. *Day*, 7 Jur. N. S. 483, 689; 2 Giff. 628.

Public officers are not hereby protected from wilful or other tort. But where they act in good faith and without subterfuge in the execution of their powers and duties the court ought not to interfere.—*Hawley* v. *Steele*, 6 Ch. Div. 528.

(*e*) to stay proceedings in any criminal matter;

A plaintiff may seek relief for loss occasioned by fraud or conspiracy and at the same time take criminal proceedings to punish the parties for a criminal offence involved in their acts. —*Saull* v. *Browne*, L. R. 10 Ch. 64.

Still less will a defendant be enjoined from setting in motion a magistrate to enforce a penalty or to do any other act within his jurisdiction.—*Kerr* v. *Corp of Preston*, 6 Ch. Div. 466.

(*f*) to prevent the breach of a contract the performance of which would not be specifically enforced;

The case has already been provided for by s. 54, clause two. As completing the artistic character of the Act the repetition is not objectionable. Of course we have already considered the defences to suits for specific performance. See Chapter II.

(*g*) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

Rights of property or of person are in contemplation of law clear and distinct. But when individual cases are considered we must consider the facts whether they constitute what in the abstract may be a right. See Griffith's Indian Evidence Acts, 188. Nuisances more than other wrongs or trespasses on right are questions of degree. And the court would itself be trespassing somewhat on the rights of property by interfering to prevent an injury which is not clearly proved by evidence as reasonably to be expected.—*Earl of Ripon* v. *Hobart*, 3 M. & K. 169; *Radcliffe* v. *Portland*, 8 Jur. N. S. 1007. The principle would lead the court to refuse a temporary injunction and reserve the case for further consideration in respect of a perpetual injunction. A. G. U. K. E. Telegraph Co., 8 Jur. N. S. 583. But a

plaintiff must not sleep on his rights. He has to consider clauses *h & j* lest he disentitle himself by acquiescence. And he must be ready with his evidence. See Griffith's Indian Evidence Acts, 190.

(*h*) to prevent a continuing breach in which the applicant has acquiesced;

Payments may be made and possession of land had without such acts amounting to acquiescence. Fry 479.—*Lindsay P. Co.* v. *Hurd*, L. R. 5 P. C. 239; *Erlanger* v. *New S. P. Co.*, 3 Ap. Ca. 1218. As in cases of nuisances so in cases of acquiescence the court may refuse a temporary injunction without deciding the right the consideration of which it reserves until the hearing of the application for a perpetual injunction.—*Bovil* v. *Crate*, L. R. 1 Eq. 388; *Hogg* v. *Scott*, 18 Eq. 453.

Acquiescence may bar the remedy for a continuing breach and yet not justify an additional trespass or extension of the original one.—*Richards* v. *Revitt*, 7 Ch. Div. 224. Yet acquiescence by landlord in breach of covenant by one tenant may amount to a waiver of breaches by other tenants.—*Peek* v. *Matthews*, L. R. 3 Eq. 515. Acquiescence is an example of the application of the maxim "volenti non fit injuria," "that to which a person assents is not esteemed in law an injury." For it is a general rule of the English law that no one can maintain an action for a wrong where he has consented to the act which has occasioned his loss. —*Wootton* v. *Dawkins*, 2 C. B. N. S. 412. And this principle has been applied under states of facts showing that though the defendant was in the wrong the plaintiff's negligence had contributed to produce the damage complained of.—*Caswell* v. *Worth*, 5 El. & Bl. 849.

Acquiescence sometimes approaches an actual licence to be implied from the licensor's conduct to do a particular thing such licenses may be revoked in a variety of ways. Griffith's Easements Act, Ch. VI. Such licenses no less than acquiescence involve a consideration of doubtful pieces of evidence. Griffith's Indian Evidence Acts, ss. 116, 117.

Acquiescence though sufficiently complete to bar an injunction does not necessarily preclude compensation for the injury.—*Wood* v. *Sutcliffe*, 2 Sim. N. S. 163. The case was one of pollution of

a stream by defendant's manufactory in the building of which the plaintiff had acquiesced.

(*i*) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust;

Trusts being peculiarly concerned with the weak and those liable to private oppression enjoy the special protection of equity. Cf. s. 54 (*f*) and Griffith's Indian Trusts Act.

An injunction to stay a company from exercising its statutory right to wind up voluntarily was refused. See Griffith's Indian Companies Act, ss, 173—190 and *Ellis* v. *Dadson*, 1891, W. N. 43. So was one to compel registration of a shareholder. Gilbert, 16 B. S. 359.

After service of writ the defendant hurried on with his buildings in the hope that when once up the court might decline to order them to be pulled down. The court without entering into the merits of the case ordered the wall to be pulled down being satisfied that the plaintiff would have been entitled to an injunction for the purpose of keeping matters in statu quo — *Daniel* v. *Ferguson*, C. A., 1891, W. N. 34.

(*j*) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court;

The three illustrations are applications of the rule. They depend on the maxim that he who seeks equity must do equity. See Griffith's Institutes of Equity, Maxim XII, p. 24. A service agreement obtained by the coercion of legal proceedings will not be enforced. Callianji, 18 B. S. 702.

(*k*) where the applicant has no personal interest in the matter.

Where a plaintiff purchased his shares for the purpose of suing the company and had a substantial interest he obtained protection.—*Hare* v. *L. & N. W. R. Co.*, 7 Jur. N. S. 1145. But where he was a mere puppet agent of a rival company the court refused to interfere on his behalf.—*Forrest* v *Manchester R.*, 7 Jur. N. S. 887.

Illustrations.

(*a.*) A seeks an injunction to restrain his partner, B, from receiving the partnership debts and effects. It appears that A had improperly possessed himself of the books of the firm and refused B access to them. The Court will refuse the injunction.

(*b.*) A manufactures and sells crucibles, designating them as "patent plumbago crucibles," though, in fact, they have never been patented. B pirates the designation. A cannot obtain an injunction to restrain the piracy.

(*c.*) A sells an article called "Mexican Balm," stating that it is compounded of divers rare essences, and has sovereign medicinal qualities. B commences to sell a similar article to which he gives a name and description such as to lead people into the belief that they are buying A's Mexican Balm. A sues B for an injunction to restrain the sale. B shows that A's Mexican Balm consists of nothing but scented hog's lard. A's use of his description is not an honest one, and he cannot obtain an injunction.

Where a trade mark represents that an article is protected by a patent when it is not protected the owner is disentitled to relief against a pirate.—*Edleston* v. *Vick*, 11 Hare 78. And yet after the expiration of a patent the designation patent may be used merely as part of a description of the article well known in the market without deceiving or intending to deceive anybody. The word patent may be a mere term of art as Patent leather boots.—*Marshall* v. *Ross*, L. R. 8 Eq. 561. But a representation of protection where there is none disentitles to relief. Leather Cloth Co., 11 H. L. C. 543.—*Cheavin* v. *Walker*, L. R. 5 C. D. 850.

Mere puffs as to the effects of a really valuable medicine will not disentitle to relief against fraudulent imitations of the trade marks, wrappers, &c.—*Holloway* v. *Holloway*, 13 Bea. 209.

Injunctions to perform negative agreement.

57. Notwithstanding Section 56, clause (*f*), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel

specific performance of the affirmative agreement, shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him.

In *Donnell* v. *Bennett*, 22 Ch. Div. 835. Fry, J., said "The court ought to look at what is the nature of the contract between the parties that if the contract as a whole is the subject of equity jurisdiction then an injunction may be granted in support of the contract whether it contain or does not contain a negative stipulation. But if on the other hand the breach is properly satisfied by damages then the court ought not to interfere whether there be or be not a negative stipulation.

The courts are unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations.—*Francesco* v. *Barnum*, 45 Ch Div. 438; *Whitfield Chemical Co. Ld.* v. *Hardman*, 1891, March 2; 39 W. R. 432. In the latter of the two cases named, an agreement entered into by H to act as manager for a term of years provided that he should "give the whole of his time to the company's business" but contained no negative covenant by him. H intimated his intention of forming and becoming director of a rival company in the immediate neighbourhood though still willing to act as manager of the original company who now applied for an injunction to restrain H from committing a breach of his agreement to give the whole of his time to them. The court of appeal refused the injunction.

Whitwood Chemical Company v. *Hardman*, is a case which throws light on the well known principle of law that contracts for personal service cannot be specifically enforced. It serves at the same time to explain the difference between an express stipulation for exclusive service and an express negative stipulation not to do something inconsistent with that service or to enter into any other service during the continuance of the agreement. The defendant had entered into an agreement with the plaintiffs, A. D. 1889, to act as their manager for a period of ten years the business being the manufacture of certain chemical products as to which the defendant had special know-

ledge. The agreement contained a stipulation "that the defendant should give the whole of his time to the plaintiffs' business that he should give due diligence to the performance of his duties and that he should conform to all the reasonable requirements of the board of directors of the company."

In the beginning of the year 1891 it came to the knowledge of the directors that the defendant was about to construct a new company in the neighbourhood of the plaintiffs' works for the carrying on of a similar business and that he intended to become a shareholder and director of the new company. The court of appeal refused an injunction to restrain the defendant observing that there was no express negative covenant or stipulation on the part of the defendant that he would not start nor carry on a similar business during his period of service and pointing out the distinction between a contract for exclusive service and a stipulation not to enter into any other service. Two cases, however, were relied on by the plaintiffs where under similar circumstances injunctions were granted. One was the case of *Webster* v. *Dillon*, in which Hatherley, L. C. then Vice-Chancellor Wood granted an injunction to restrain an actor who had entered into a contract to perform on certain nights at a certain theatre from performing on those nights at another theatre; the other case was *Montague* v. *Flockton*, L. R. 16 Eq. 189, in which Malins V. C. granted an injunction under similar circumstances although there was no express negative stipulation by the defendant. In what was the leading case of *Lumley* v. *Wagner*, 1 DeG. M. & G. 604, Lord St. Leonards granted an injunction but there an express negative stipulation had been entered into by the defendant who had agreed to sing at the plaintiff's theatre that she would not sing at any other. L. T., 1891, April 4. One was granted to prevent a railway servant leaving Madras. 14 M. S. 18.

The rules of pleading evidence and procedure or practice are the same for decrees for perpetual injunctions, as for other decrees see Griffith's Civil Procedure Code, Ch. VIII & XI, and Griffith's Indian Evidence Acts, Ch. VIII, XI. For temporary injunctions where the mischief of acting prematurely may be remedied by putting the applicant upon terms relaxations of the ordinary rules have been introduced by the Code of Procedure. See Griffith, Ch. XXXV.

But a mere hypothetical title set out in the plaint which must be filed. Griffith's Code, Ch. V. is not sufficient.—*Davies* v. *Leo*, 6 Ves. 786. But presumptive evidence of an alleged absolute is sufficient.—*Norway* v. *Rowe*, 19 Ves. 141. Where the construction of a contract leave it doubtful whether a breach has been committed the case is analogous to a hypothetical title.—*Child* v. *Douglas*, 5 D. M. & G. 739. A defendant need not as a rule plead to an injunction prayed for in the plaint. He may usually reserve his facts till application is made for the injunction.—*Booth* v. *Taylor*, L. R. 1 Ex. 51. As a hypothetical title does not justify an order for an injunction so an apprehension of injury not resting on solid grounds of evidence, or on grounds which show that the apprehension is premature because the injury cannot possibly occur till after a certain date.—*Coates* v. *Coates*, 6 Mad. 287; *Cowley* v. *Bias*, 5 Ch. Div. 944.

A plaintiff seeking an injunction ought correctly to describe the character in which he sues and as he seeks an extraordinary remedy ought in his application to state not only the truth but the whole truth so far as he can. But the rules of pleading are so far relaxed that persons not technically parties to the suit may be enjoined, for example a purchaser under a decree who has not paid his money into court, a tenant in possession acting for the defendant, a tenant let into possession by a receiver.

Section 588 (24) gives an appeal from orders under this section and ss. 493, 496, and 497. It is thought that the appeal court would allow the appellant to adduce fresh evidence. Such is the practice in England in cases of urgency.

Where an appeal is about to to be made an injunction against parting with property will be continued though the suit respecting the same has been dismissed, if another course would render a successful appeal nugatory.—*Sturla* v. *Freccia*, 12 Ch. Div. 438.

The process to enforce obedience leading to penal results the defendant ought to have clear notice of the intention to apply for it.—*Ellerton* v. *Thirsk*, 1 J. & W. 376.

The dismissal of a suit dissolves an injunction. A motion to dissolve should be preceded by notice to the plaintiff or his authorized agent. The applicant may rely on legal objections to the plaint. The case is also heard on its merits and the

plaintiff may adduce additional evidence except where he has suppressed material facts on his first application. The vagueness of the original order and prejudice otherwise likely to arise therefrom are grounds for dissolution. *Dover* v. *L. C. & D. Ry.*, 7 Jur. N. S. 453.

Informal notice of an injunction is sufficient. But it is of course better to give direct notice to the party enjoined. In urgent cases this can and may be done by the electric telegraph. E. P. Langley, 13 Ch. Div. 110. An injunction does not affect a new owner even if he own by purchase. Should he however continue the wrong he is liable to new proceedings.—*A. G.* v. *B. T.*, 17 Ch. Div. 692.

Inasmuch as no action can be brought against an infant on a covenant to serve.—*Gylbert* v. *Fletcher*, Cro. Car. 179, a negative clause in an apprentice deed not to accept a professional engagement without the consent of her master will not be enforced by injunction.—*De Francesco* v. *Barnum*, 43 Ch. Div. 165. Fatima 20 C. S. 508.

Illustrations.

(*a.*) A contracts to sell to B for Rs. 1,000 the good-will of a certain business unconnected with business-premises, and further agrees not to carry on that business in Calcutta. B pays A the Rs. 1,000, but A carries on the business in Calcutta. The court cannot compel A to send his customers to B, but B may obtain an injunction restraining A from carrying on the business in Calcutta.

(*b.*) A contracts to sell to B the good-will of a business. A then sets up a similar business close by B's shop, and solicits his old customers to deal with him. This is contrary to his implied contract, and B may obtain an injunction to restrain A from soliciting the customers, and from doing any act whereby their good-will may be withdrawn from B.

(*c.*) A contracts with B to sing for twelve months at B's theatre and not to sing in public elsewhere. B cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A from singing at any other place of public entertainment.

(*d.*) B contracts with A that he will serve him faithfully

for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival-house as clerk.

(*e.*) A contracts with B that, in consideration of Rs. 1,000 to be paid to him by B on a day fixed, he will not set up a certain business within a specified distance. B fails to pay the money. A cannot be restrained from carrying on the business within the specified distance.

Personal solicitation of customers of a business after its sale is enjoined; but the injunction does not in the absence of a stipulation on the sale restrain general advertisements that the plaintiff is carrying on a similar business.—*Labouchere* v. *Dawson*, L. R. 13 Eq. 325. Where the sale is a compulsory one as on insolvency the court does not enjoin the insolvent from soliciting his old customers.—*Walker* v. *Mottram*, 19 Ch. Div. 355.

B sold his share in a tailor's partnership to his partner A. It was agreed that B should not carry on business within a district but should be employed by A as cutter out. The court enforced the first stipulation but not the second.—*Rolfe* v. *Rolfe*, 15 Sim. 88.

A agreed to employ B as agent at a commission of 40 per cent. and not to employ any other agent at a greater commission than 25 per cent. The court could not enforce the first stipulation but enjoined the second.—*Dietrichsen* v. *Calburn*, 2 Ph. 52.

An author who had agreed not to write for another publisher was enjoined from so doing.—*Stiff* v. *Cassell*, 2 Jur. N. S. 348.

The cases as to restraint of trading by an individual are numerous. "The principle to be deduced from all the cases is that the question to be determined is whether the restraint having regard to all the circumstances of the case and the nature of the employment is greater than is necessary for the protection of the person in whose favour it is imposed."—*Mills* v. *Dunham*, 1891; 1 Ch. Div. 587.

Where a manager agreed to give his whole time to the management of the plaintiff's business but without negatively contracting not to serve any one else. *Held*, that the court would not grant either specific performance of the contract for service

or an injunction for breach of such contract.—*Whitwood Chemical Co.* v. *Hardman*, C. A., 1891, W. N. 42.

A stipulation in an agreement for service between a carrier and his manager that the former would not require the latter to leave the employ though negative in form is positive and affirmative in substance and cannot be enforced by injunction. Davis 1894, 3 Ch. 654. But an injunction was granted to restrain a company from cutting telephone wires which it had agreed to maintain in working order. Fechler 1894, 1 Q. B. D. 125, see Cullianji, s. 56.

SCHEDULE.

(*See Section* 2.)

ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of Repeal.
VIII of 1859...	Civil Procedure ...	Sections 15 and 192.
XIV of 1859...	Limitation	Section 15.
XXIII of 1861...	Civil Procedure ...	Section 26.
IX of 1872...	Contract	In section 28, the second clause of Exception 1.

APPENDIX.

Marriage Articles.

ARTICLES of agreement made day of A. D. BETWEEN A B of [intended husband] of the first part C D of [intended wife] of the second part and E F of and G H of [trustees] of the third part. WHEREAS a marriage is intended shortly to be had and solemnized between the said A B & C D and in consideration and contemplation thereof the said A B & C D have arranged to enter into the agreement on their parts respectively hereinafter contained NOW THESE presents witness.

(1) That the said C D & A B for themselves their respective heirs executors and administrators agree with the said E F & G H their executors administrators and assigns that they and each of them will as soon as conveniently can be after the solemnization.

Agreement to settle.
Trusts.
[Agreement to insure life].
Settlement to contain all usual and proper covenants.

Forms of Decrees.

Decree at hearing of suit.
Further consideration.
Specific Performance.

1. *Reference of title.*
    1. Inquiry as to title at the hearing.
    2. Declaration of right in action by vendor and inquiry.
    3. Same—where title accepted subject to requisitions and subject to compensation.
    4. Inquiry as to title and delivery of abstract and objections and answers thereto.

2. *Decree for specific performance.*
    1. On bill by seller to enforce contract for sale.
    2. Inquiry as to value of timbers and acts of husbandry—occupation rent.
    3. Purchaser having waived title indemnifies against mortgage.

3. *Compensation or abatement.*
    1. Inquiry if title to which part is not shown material.
    2. Abatement for delay.
    3. Abatement for deficiency.

4. *Decree for lease.*
    1 Performance of agreement.
    2. Mutual leases.
    3. Option of further term.
    4. Inquiry if leases tendered for execution are proper.
    5. Order to vary certificate and re-settle lease.
    6. Lease antedated to enable action on covenants.

Lost Instruments.

1. Decree for account and inquiry as to mortgage deeds defendant to pay in amount claimed.
2. *Lost Settlement.*

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    2. Plaintiff being mortgagor.
    3. Lost settlement.
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2. Conveyance established though destroyed by testator and estate devised by his will.
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Forged Instruments.

1. Account declared forged and retained in court.
2. Decree to make good payments made on account of shares to supposed lawful children on forged certificate of marriage of parents.

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1. Release set aside for fraud and not to be pleaded.
2. Decree discharging surety from liability and setting aside deed as to him.
3. Plaintiff declared not bound by mortgage and judgment obtained by him by fraud by his solicitor who received and misapplied the money.
4. Settlement by lunatic since so found set aside.
5. Conveyance in contemplation of insolvency set aside.

Decree at the hearing of a suit.

This suit coming on [the day of and]

Decree at the hearing of a suit.

Court of } { Date and Title

This suit coming on [the day of and] this day to be heard and debated before in the presence of counsel learned for the plaintiff and defendants A and B [no one appearing for the defendants C and D though they were duly served with as by the affidavit of filed the day of appears] and the pleadings in this cause being opened upon debate of the matter and hearing [enter evidence] and what was alleged by the counsel [on both sides or] for the plaintiff and the said defendants A and B. This court doth order and decree [or declare].

Further Consideration.

This cause coming on [the day of and] this day to be heard before [for subsequent] for further consideration in the presence of counsel learned for the plaintiff and defendants [and in the presence of counsel for D [who by an order dated had leave to attend the proceedings] [the purchaser of the real estates of the testator sold pursuant to the order dated] [upon whose application the funds are restrained by an order dated]] and upon the motion of the defendant A to vary the chief clerk's certificate dated [and upon the motion of the defendant B to vary,

&c., which upon hearing the solicitors for the applicant and for in chambers was adjourned to be heard in court and] upon opening and debate of the matter and hearing the said [enter evidence] read and what was alleged by the counsel on both sides [or for] the court doth order.

Note.—Where a defendant persistently endeavours to evade the specific performance of a decree a more peremptory form is usual.—*Morgan* v. *Brisco*, 31 Ch. Div. 216; 32 Ch. Div. 192.

Specific Performance.

1. *Reference of Title.*

1. Inquiry as to title at the hearing.

Let the following inquiries be made that is to say, 1. An inquiry whether a good title can be made to the estates comprised in [Lot No. 3 in the particulars of sale and in] the agreement in the plaintiff's bill mentioned. 2. And in case it shall appear that a good title can be made to the said estates an inquiry when it was first shown that such title could be made. Adjourn.

2. Declaration of right in action by the vendor and inquiry.

This court doth declare that the agreement in the pleadings mentioned ought to be specifically performed and carried into execution in case provided that a good title can be made to the hereditaments comprised therein. And decree the same accordingly. Inquiries to title as in (1).

3. Same—where title accepted subject to requisitions and subject to compensation.

Declare that the defendant is bound to accept the title of the plaintiff to the estate mentioned in the agreement of the day of in the plaintiff's claim mentioned subject to the requisitions of the defendant upon the said title mentioned in the exhibit marked B and dated And declare that the plaintiff is entitled to a specific performance of the said agreement subject to the deduction of £ from the amount of the purchase-money of £ by way of compensation to the defendant in respect of the house tax in the defendant's affidavit mentioned. Provided that the

plaintiff can make a good title to the estate comprised in the said agreement so far as respects the matter of the said requisitions. Inquiry as to title with respect to requisitions.

4. Inquiry as to Title and Delivery of Abstract and Objections and Answers thereto.

Let the following inquiries be made that is to say, 1. An enquiry whether the plaintiff can make a good title to the property in question in this cause agreed to be purchased by the defendants having regard to the agreement for sale in the pleadings mentioned and when it was first shown that such good title could be made. 2. An inquiry whether the plaintiff ever and when delivered or caused to be delivered to the defendants an abstract of his title and whether the same was a perfect abstract or in any and what respects deficient and if deficient whether the same was afterwards and when perfected. 3. An inquiry whether the defendants ever and at what time or times delivered any and what objections to the plaintiff's title or made any and what requisitions upon or with respect to the same or the abstract thereof or the conveyance or assignment of the property in question agreed to be purchased by the defendants or the parties to such conveyance or assignment. 4. An inquiry whether the plaintiff at any and what time or times returned any and what answers to such objections and requisitions.

Decree for Specific Performance.

1. On bill by seller to enforce contract for sale.

Declare that the agreement in the plaintiff's action mentioned dated ought to be specifically performed and carried into execution and decree the same accordingly. 1. And let interest be computed at the rate of on the sum of the residue of the purchase-money for the estate comprised in the said agreement from the day of when the same ought to have been paid according to the terms of the said agreement. 2. And let an account be taken of the rents and profits of the said estate received by the plaintiffs or any of them or by any other person since the day of . [And tax the plaintiffs their costs of this suit And let what shall be coming in on account of the rents and profits be deducted, &c.,] And let upon

the plaintiffs executing a proper conveyance of the estate to the defendant [at the expence of the defendant according to the said agreement] or to whom he shall appoint such conveyance to be settled by the Judge in case the parties differ and delivering to the defendant upon oath all deeds and writings in their custody or power relating to the said estate the defendant pay to the plaintiffs the balance which shall be certified to remain due to them in respect of such purchase-money and interest [and costs] after such deduction as aforesaid. Liberty to apply.

2. Inquiry as to value of timber and acts of husbandry—occupation rent.

Decree specific performance of contract and compute interest on residue of purchase-money from when it should have been paid. And let an inquiry be made what was the value of the timber trees labour seeds and dressings on the said estate on the day of and let interest be computed on such value from after the like rate of interest. And let an annual value by way of occupation rent be set on the said estate from And let the plaintiff be charged therewith accordingly. And let the same be deducted from the remainder of the said purchase-money and interest thereon and the said value of the said timber trees labour seeds and dressings and the said interest thereon. And let upon the plaintiff executing and delivering to the defendants a proper deed of conveyance of the said estate, &c., the defendant pay to the plaintiff what shall be certified to remain due in respect of the said purchase-money and interest thereon and of the value of the said timber trees labour seeds and dressings and interest thereon after such deduction as aforesaid. No costs on either side. Liberty to apply.

3. Purchaser having waived title indemnifies against mortgage.

Declare that under the circumstances in the plaintiffs claim mentioned the defendants have waived their right to investigate the plaintiffs title to the estate in the pleadings mentioned and that they have accepted such title. And let the defendants specifically perform the agreement dated by accepting an assignment of the equity of redemption of the

said estate from the plaintiffs without previous investigation of the title. And let the defendants execute to the plaintiffs a proper deed of indemnity against the mortgage debt secured by the indenture in the bill mentioned, dated, &c., and interest thereon the plaintiffs by their counsel undertaking to execute and deliver to the defendants a proper deed of assignment of the said equity of redemption and otherwise specifically to perform the said agreement on their parts so far as the same has not been waived by the defendants.

Compensation or Abatement.

1. Inquiry if part to which title is not shown material.

Let an inquiry be made whether such part if any of the said estate as to which the plaintiff cannot make title is material to the enjoyment of the remainder and if not what deduction ought to be made from the purchase-money in respect thereof.

2. Abatement for delay.

Defendant by his answer admitting the agreement, &c., decree for performance and accounts, &c. And let the defendant be at liberty to deduct the sum of by way of compensation for delay in delivering possession of the said estate to the defendant.

3. Abatement for deficiency.

Declare the plaintiff entitled to specific performance. And to a abatement from the residue of the purchase-money and interest but to the amount only of what would be the worth of the deficiency of the soil mentioned in the pleadings covered with wood after deducting the value of the wood thereon. Direction to compute interest on the residue of the purchase-money, &c.

Decree for Lease.

1. Decree performance of agreement, &c.

And let the defendant execute a lease of the estate comprised in the said agreement for the term therein mentioned to the plaintiff (with the usual covenants according to the said agreement). And let such lease be settled by the Judge in case the parties differ. And let the plaintiff execute to the defendant a counterpart of such lease. Liberty to apply.

2. Decree for execution of agreement for mutual leases.

Let the defendant execute to the plaintiff a lease for years of all such parts of the house No. &c., described in the plan to the bill annexed as are coloured the plaintiff offering to execute a lease for the like term to the defendant of all such parts of the premises described in the said plan as are coloured at the rent of And let plaintiff and defendant execute to each other counterparts of such leases respectively. And let such leases be settled by the Judge, &c. Defendant to pay plaintiff's costs of suit. Liberty to apply.

3. Decree for lease with option of further term.

Decree the performance of the agreement in the plaintiff's bill mentioned. Declare that on the true construction of such contract the plaintiff is entitled on the terms in such contract mentioned to have a lease of the messuage, &c., therein comprised for an additional term of twenty-one years in addition to his unexpired term therein such term of 21 years to be determinable at the end of the first seven or fourteen years at the lessee's option and on giving months notice and for a further term of seven years to commence at the expiration of the said term of 21 years if not previously determined and on giving notice requiring the same before the expiration of such term of years and to have his rent reduced from the day of to £ per annum. And the plaintiff by his counsel waiving the option of determining the said term of 21 years at the expiration of the first seven or fourteen years thereof and electing to take the further term of seven years from the expiration of the term of 21 years let a lease of such messuages having regard to the waiver and election of the plaintiff be settled by And let such lease be executed by the plaintiff to the defendant B And let the defendant B execute to the plaintiff a counterpart thereof. Infant and persons not in esse declared trustees for the purpose of granting the lease and consequent directions [see executors]. Directions as to costs. Liberty to apply.

4. Decree for inquiry if leases tendered for execution are proper.

Decree performance and let an inquiry be made whether the lease of the messuage in question executed by the plaintiff and tendered to the defendant is a good lease. And if not let a lease be settled by the Judge. But if it shall be certified that the said lease tendered is a good lease let the defendant accept the same and execute a counterpart thereof.

5. Order to vary certificate and resettle lease.

The court being of opinion that the said lease should be varied by inserting therein at after the word "appurtenances" the words and also by striking out of such lease all such covenants And let such lease contain a covenant on the part of the plaintiff to pay the rent charge payable in respect of.

6. Lease antedated to enable action on covenants. Defendant to admit execution on date.

And the plaintiff by his counsel consenting that the lease directed by the said decree dated to be executed by the defendant to the plaintiff shall be antedated with the date of day and undertaking to admit in any action which may be brought under such lease for the recovery of the possession of the estate to be demised by such lease or upon any breach or breaches of any covenant or covenants to be contained in such lease that the said lease was executed on the day that it shall bear date let the said decree dated for specific performance be affirmed. Defendant to pay plaintiff's costs of appeal.

Lost Instruments.

1. Decree for account and inquiry as to mortgage deeds. Defendant to pay in amount claimed.

Let the defendant R on or before day of pay into the bank Rs. being the amount of the principal sum of Rs. stated in the plaintiff's claim to be due on the mortgages in the pleadings mentioned with interest thereon from after deducting And let the same when so paid in be laid out in the purchase of in the name of the Accountant-General in trust in this cause [the account of]

And let the following account and inquiry be taken and made that is to say, (1) An account of what is due to the plaintiff for principal and interest upon the several mortgages in the pleadings mentioned; (2) An inquiry what has become of the several mortgage securities in the pleadings mentioned or (2) An inquiry what title deeds evidences and writings relating to the mortgaged estates were delivered to the mortgagee in the pleadings mentioned by H. deceased or by any other person or persons by his order and what has become of the same. Adjourn, &c.

2. *Lost Settlement.*

Let the following inquiries be made that is to say, (1) An inquiry whether there is any and if any what issue of the marriage between the defendants B & F his wife; (2) An inquiry whether any and if any what settlement was executed upon or previously to the marriage of the said B & F his wife and whether such settlement is in existence; (3) And if it shall appear that such settlement is not in existence an inquiry what were the terms and provisions of the said settlement and of what particulars the property comprised therein or affected thereby consisted at the date of the said settlement and of what it now consists.

Lost Instruments—Further Order.

1. Mortgage. Plaintiff being mortgagee.

Tax defendants costs of suit and raise and pay them out of the fund in court. Let the plaintiff S at her own expense execute to the defendant R her bond to indemnify the said defendant against any demand which may be made upon him in respect of the mortgage deeds in the pleadings mentioned such bond to be settled in case the parties differ. And let upon the due execution of such bond such execution to be certified by the residue of the said sum of be transferred to the plaintiff S And thereupon let the plaintiff re-convey and re-assign the mortgaged hereditaments to the defendant R or as he shall direct free and clear of all incumbrances such reconveyance to be at the expense of the defendant R. Liberty to apply.

2. Mortgage. Plaintiff being mortgagor.

Declaration of title to redeem. Perpetual injunction to stay ejectment And the plaintiff having paid the defendant's principal money defendant to reconvey and deliver all deeds evidences and writings relating to the mortgage and to repay interest paid to him without prejudice by the plaintiff after months notice of paying off the mortgage "And let the defendants at their expense give to the plaintiff a good and effectual security in respect of the deeds dated in mentioned to indemnify the plaintiff his heirs and assigns and his and their estate and effects and the mortgaged hereditaments in the pleadings mentioned from and against all loss costs, charges, damages and expenses and other consequences which the plaintiff his heirs or assigns or the said hereditaments shall or may incur sustain or become liable to for or by reason or on account of or in respect of the said loss of the said deeds in any money howsoever.

3. Lost Settlement.

Declare that the land at comprised in and the sum of £ and also the real and personal property which shall devolve upon the defendant F the wife of the defendant B during the marriage of the said defendants are subject to the trusts of the indenture of settlement executed upon such marriage as in the said (certificate) mentioned. And let all proper parties join in executing a deed of settlement of the trust property hereinbefore set forth pursuant to the terms in the said certificate mentioned as the Judge shall direct such settlement to be settled by the Judge. Tax all parties costs of suit as between solicitor and client. And of and incident to the preparation and execution of the said deed of settlement. Trustees to retain and pay them out of trusts funds. Liberty to apply.

4. Draft Settlement to be enrolled.

And it appearing (by the evidence in this cause) that the indenture of settlement in the pleadings mentioned was duly executed by all proper parties on the day of in the terms of the draft thereof now produced and marked with the letter A and signed by the and that such settlement has been lost or mislaid and cannot be found although

due search has been made for the same. Let the said draft be enrolled in this court. And let and be appointed trustees of the said settlement in the place of and deceased. Plaintiffs' and defendants' costs as between solicitor and client including any costs charges and expenses relating to the trust to be taxed and raised out of the trust fund. Defendants to transfer the residue thereof to the new trustees and pay interest before the transfer to the plaintiff to the tenant for life.

Instruments destroyed or suppressed.

1. Decree to convey.

[B claiming under a settlement and an administration destroyed the will which revoked the settlement of which will A was executor and devisee].

Direction for the defendant B by a conveyance to be settled, &c., to convey the estate at to the plaintiff A and his heirs and deliver to him possession thereof and all deeds and writings relating thereto on oath. Account of the rents and profits received by B since the death of C. Account of the personal estate of C come to the hands of B. Out of the personal estate of C an allowance to be made to B for what debts of C shall appear to have been paid by him. What of the said accounts shall be certified to remain in the hands of B of the rents and profits and of the personal estate to be paid by B to A. Plaintiff to pay the other executors' costs of suit to be taxed. And the costs plaintiff shall so pay to be paid by B to him and his own costs to be taxed.

2. Conveyance established though destroyed by testator and estate devised by his will.

Declare that the indenture in the pleadings mentioned dated was on that day duly executed by G. L. deceased the testator in and H in named and that the said indenture as appears by the draft from which the same was engrossed was in the words and figures following that is to say "This indenture, &c." And declare that the plaintiff became on the death of E in the pleadings named and is now seised of and well entitled to the inheritance in possession of the inheritance comprised in and conveyed by the said indenture and is

entitled to hold the same accordingly free from all claims of the defendant's or any of them. And let the defendant J Q within months deliver up to the plaintiff possession of the hereditaments comprised in and conveyed by the said indenture. And let the defendant J Q within deliver to the plaintiff all title deeds on oath and all other documents of title in their or any of their possession or power relating to the hereditaments. Account of rents and profits against J Q.

3. Compensation for damage by loss of title deeds wilfully burnt by mortgagee.

Account of what is due to plaintiffs for principal and interest on their mortgage. An inquiry what ought to be allowed as a sufficient compensation for the damage done to the estate in question by the destruction of the deeds mentioned in the said report. And let the amount which shall appear to be proper to be allowed for such compensation be set off against what shall appear to be due for such principal and interest. And let upon the defendants paying to the plaintiffs what shall be certified to be due for principal and interest after deducting the amount of such compensation within months after at such the plaintiffs reconvey and deliver up all deeds and writings in their custody or power. And also office copies of the letters, &c., and attested copies of the deeds certified to be destroyed upon oath to the defendants or to whom they shall appoint. But in default foreclosure.

Forged Instruments.

1. Account declared forged and retained in court.

Affirm decree setting aside sale for imposition and directing account of purchase-money and interest at 5 per cent. "And declare that the account produced dated is a forged account." Plaintiff recommended to prosecute defendant for forging it or publishing it knowing it to be forged. Direction that the account annexed to an affidavit be preserved in the office to be forthcoming in case of prosecution and for the proper officer to attend with it on any trial.

2. Decree to make good payments made on account of shares to supposed lawful children—on forged certificate of marriage of parents.

Declare that the defendants M, J, J K, are not lawful children of the defendant W K and were not nor are entitled to any share or interest under the will of B deceased the testatrix in the pleadings named. And declare that the defendants J J and M his wife and J K are severally liable to repay to the trust estate the several sums received by them respectively in respect of their supposed shares of the proceeds of the sale of the real estate of the testatrix specifically devised by her together with interest thereon at the rate of £ per cent. per annum from the day of being the time of the receipt of such sums respectively. And it appearing that the defendant W K sent to the trustees a forged document purporting to be a certificate of his having been married to the mother of the defendants J, J K on the day of being before the birth of such children whereas he was married to her on the day of being after the birth of such children. Declare that the defendant W K is liable to pay to the said trust estate so much of the said respective shares with interest as may not be paid by the said defendants. And declare that the defendant H [trustee] the estate of S [deceased trustee] are jointly and severally liable to pay to the said trust estate so much of the said respective shares and interest as may not be so paid by the said other defendants or any of them."

Directions for the defendants to make good the sums paid on account of shares of the testator's estate in the order of liability declared and the estate of the deceased trustee with account thereof his executor not admitting assets and so as to costs.

3. Declaration that a declaration of trust in favour of purchaser's agent was forged and that the purchased estate belonged to purchaser's wife as his devisee with consequent directions. —See *Masters* v. *Braban*, M. R. 10th July 1735, B. 504; 1 Rus. 560 n.

Fraudulent Dealings.

1. Release set aside for fraud and not to be pleaded at law.

Declare that the release dated obtained by the defendant C from the plaintiff M was a fraud on her and ought to be delivered up to be cancelled. And let the defendant C

within deliver up the said release to the plaintiff M. And in the meantime let the said defendant be restrained from pleading or setting up the said release in bar to the action brought by the plaintiffs P and M in the names of the plaintiffs M and S upon the bond executed to them by the said defendant for the benefit of the plaintiff P. Defendant C to pay plaintiffs costs of suit except so much of such costs as relate to the deposition of Liberty to apply.

2. Decree discharging surety from liability and setting aside deed as to him.

Declare that the plaintiff is in equity discharged from all liability under the indenture in the bill mentioned dated the said indenture not having been executed by B who is named as one of the sureties therein. And decree that such indenture be so far as the plaintiff is concerned set aside and cancelled. Defendants to pay plaintiffs costs of suit. Liberty to apply. Affirmed in effect on appeal but the deed being to be set aside only as to one party order varied and injunction granted to stay any proceedings at law upon the deed in lieu of directing it to be cancelled.

3. Plaintiff declared not bound by mortgage and judgment obtained from him by fraud by his solicitor who received and misapplied the money.

Declare that the plaintiff is not bound by the deeds of mortgage and further charge in the plaint mentioned. And let the same be delivered up to be cancelled. And let satisfaction be entered upon the judgment in the plaint mentioned obtained by the defendants C and R [mortgagees innocent parties] against the plaintiff. Defendants to pay plaintiffs costs of suit.

4. Settlement by lunatic since so found set aside.

And it appearing by the evidence aforesaid that the indenture of settlement dated made or expressed to be made between F of the one part and the defendants M and S of the other part executed by the said F since deceased when of unsound mind. Declare that the said indenture dated is null and void. And let the defendants M and S deliver up the said indenture to the plaintiff to be cancelled. Direction to tax raise and pay costs of all parties out of fund in court

[settled fund] and for transfer of the residue to the legal personal representatives of the lunatic.

5. Conveyance in contemplation of insolvency set aside.

Declare that the indenture dated in the pleadings mentioned is fraudulent and void as against the creditors of in the pleadings named. And let the defendant deliver up the said indenture to be cancelled. And let an account be taken of the rents and profits of the hereditaments, &c., comprised in the said indenture received by the defendant or by any other person. And let the said defendant within one month after the date of 's certificate of the result of such account pay the balance if any that shall be certified to be due from him to the plaintiffs C and F as the assignees of the estate of the said bankrupt. Defendant to pay plaintiffs costs of suit. But in case on taking the said account any balance shall appear to be due to the said defendant. Let the further consideration of this cause and of the subsequent costs be adjourned.

See Griffith's Indian Law of Insolvency, p. 85.

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Ex. R. G. W.
2/27/09.

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